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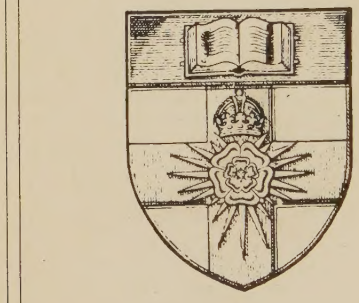

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AND

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EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

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CORRIGENDA.

Page 23, line 2 from bottom, for "*Mary Anne Flynn*", read "*Michael Flynn*".
,, 196, ,, 6 ,, ,, ,, "*H. Webb*", read "*C. ffordе*".
,, 197, ,, 11 ,, ,, delete "*Swayne K.C.*"
,, 248, ,, 13, add "with them Hugh Kennedy (of the Irish Bar)".
,, 510, ,, 3, delete comma after "nobiles".
,, ,, ,, 18, delete comma after "nobiles".
,, ,, ,, 3 from bottom, for "Professor", read "Provost".
,, 515, ,, 2 ,, ,, for "documents", read "decrements".

MEMORANDA.

On 7th July, 1919, the Right Hon. Arthur Warren Samuels was appointed a Judge of the King's Bench Division in Ireland.

On 11th July, 1919, Denis Stanislaus Henry K.C. was appointed His Majesty's Attorney-General for Ireland; and Daniel Martin Wilson was appointed His Majesty's Solicitor-General for Ireland.

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CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1919.

M'DAID *v.* MILFORD RURAL DISTRICT COUNCIL (1).

K. B. Div. 1917. Nov. 2, 5, 12.

Appeal. 1918. May 31. June 10.

Labourers (Ireland) Acts—Improvement scheme—Temporary letting of plot to a person not an agricultural labourer—Breach of statutory duty—Preferential right—Labourer's right of action—Labourers (Ireland) Act, 1886, *s.* 15; *Labourers (Ireland) Act*, 1906, *s.* 29.

A rural district council made an improvement scheme under the Labourers Acts based upon a representation signed by, or on behalf of, agricultural labourers, amongst whom was the plaintiff, whose representation was in respect of a cottage and about an acre of land. Regulations in pursuance of section 29 of the Labourers (Ir.) Act, 1906, were framed and adopted by the council. Pending the erection of the cottage, the council, acting under section 15 of the Labourers (Ir.) Act, 1886, made a temporary letting of the plot to a farmer who had not signed a representation, whereupon the plaintiff claimed damages on the ground that they were bound to give him a preference.

Held, by the King's Bench Division (Sir James Campbell C.J. and Dodd J.) (following *Tevlin* v. *Lisnaskea Rural District Council*, [1914] 2 I.R. 15), that a temporary letting under section 15 of the Labourers (Ir.) Act, 1886, is a letting of an allotment within section 29 of the Labourers (Ir.) Act, 1906, and that the plaintiff was entitled to a preferential right thereto.

(1) Before Sir Ignatius J. O'Brien C., and Ronan and Molony L.JJ.

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Held by the Court of Appeal, reversing the King's Bench Division, that the preferential right given by section 29 of the Act of 1906 applies only to the letting of a cottage and plot as one entity, and does not apply to a temporary letting under section 15 of the Act of 1886.

Held also, that the statutory preference given to a labourer who has signed a representation is only a right to be preferred, caeteris paribus, to agricultural labourers who are not representators, and is not absolute.

Tevlin v. *Lisnaskea Rural District Council*, [1914] 2 I. R. 15, overruled.

Quaere: Whether a personal claim for damages by a labourer can be sustained where there is a breach of statutory obligation on the part of a council in the letting of a cottage and plot.

CASE STATED by Gibson J. at Lifford Summer Assizes, 1917.

The appeal was by the defendants from a decree dated April 2nd, 1917, for £9 damages for breach of statutory duty under the Labourers Acts. The civil bill was for £20 damages "for that the defendants being under a statutory obligation under the Labourers Acts to provide a plot of land and cottage for plaintiff refused to provide such, and for that the defendants being under a statutory obligation to give plaintiff a preference in the letting of a plot of land in the townland of Fortstewart refused to give plaintiff the said preference, and gave the plot in question to one James O'Brien who did not sign a representation and who was not under the said Acts entitled to said plot." An improvement scheme under the Labourers Acts which provided for the taking of eighty-one plots and the erection of a cottage upon each was made by the defendants and confirmed by the Local Government Board on July 16th, 1912. In 1910 the defendants framed and approved regulations in pursuance of section 29 of the Labourers (Ireland) Act, 1906, and these were confirmed by the Local Government Board in April of the same year. The improvement scheme was based upon representations signed by or on behalf of agricultural labourers, among whom was the plaintiff, in respect of whose representation it was proposed to erect a cottage on a plot in the townland of Fortstewart.

Mr. Justice Gibson stated the other facts as follows:—

"The plot proposed to be let to the plaintiff was No. 310, an area somewhat under one acre. The plaintiff applied as a labourer without proper housing accommodation. He was married and had four children. The land was purchased by defendants on

4th February, 1913, but the houses could not be built, as the limit of expenditure prescribed by the Local Government Board (£170 for land and building together) would have been considerably exceeded. The representation was for house and land. The rent was to be 1*s.* 6*d.* a week; the defendants declined to authorize allotments.

"The defendants let the plot pending the execution of the building part of the scheme to O'Brien, a small farmer, who was not an agricultural labourer, on the dates and for the rents following:—13th March, 1915, £1 5*s.*; 16th December, 1915, for the year, at £2 10*s.*; and 10th March, 1917, at £1 2*s.* 6*d.* Applications for the letting were invited by poster, and plaintiff offered for above respective periods £1 5*s.*; £2 5*s.*; and 15*s.* The first offer of £1 5*s.* was not received till after O'Brien's offer was accepted. The defendants thought it their duty to accept the higher offer.

"The evidence of damages was not satisfactory; but it was agreed, as a question of the law was to be decided, to accept the figure in the decree if the plaintiff was entitled to recover damages.

"Mr. Kelly, for the plaintiff, contended that the land having been let to O'Brien, who was not a labourer, the plaintiff's statutory rights were infringed, and he was entitled to sue for damages. Mr. Wood argued that no action lay, and as the point was important he requested me to state a case. I assented on the terms (accepted by him) that defendants should pay the plaintiff's costs in any event, as between party and party, up to the decision of the King's Bench Division, not exceeding £10.

"I expressed no opinion on the question of law raised, but pointed out the difficulty from the right claimed relating to a house and land as one entity, and from the failure to provide the house being attributable to causes beyond defendants' control.

"The questions for the decision of the Court are:—1. On the above facts is the action maintainable? 2. Should the decree be affirmed, reversed, or varied?"

Wylie K.C. and *E. Kelly*, for the plaintiff.

Henry K.C. and *A. E. Wood*, for the defendants.

The arguments were similar to those in the Court of Appeal.

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SIR JAMES CAMPBELL C.J. delivered the judgment of the Court as follows:—

The District Council of the rural district of Milford in the county of Donegal having made an improvement scheme under the Labourers Acts, whereby it was proposed that land should be taken compulsorily and house accommodation provided, the Local Government Board by Order of the 16th July, 1912, confirmed the scheme. Prior to this, that is to say upon the 28th January, 1910, the council framed and approved regulations in pursuance of section 29 of the Labourers (Ireland) Act, 1906 (6 Edw. 7, c. 37), which were adopted and sealed by the council on the 2nd April following, and duly confirmed by the Local Government Board upon the 27th April of the same year. The improvement scheme was based upon representations signed by or on behalf of agricultural labourers, and amongst the number was a representation signed by the plaintiff as an agricultural labourer, married, with four children, and without proper housing accommodation. This representation was in respect of a cottage and about an acre of land attached, in the townland of Fortstewart, within the Milford rural district, and was received by the council upon the 14th September, 1910. In the scheme, as confirmed, provision is made for the building of this cottage and the acquisition of one acre of land. The number of the site is given as 310, and it appears to be the only cottage provided for Fortstewart. The land was purchased by the council upon 4th February, 1913, but the house could not be built, as the limit of expenditure prescribed by the Local Government Board for the cost of house and land would, owing to the great increase in the cost of materials, have been considerably exceeded. Pending the erection of the cottage the council determined in the assumed exercise of their powers under sect. 15 of the Labourers (Ireland) Act, 1886 (49 & 50 Vict. c. 59), to make a letting of the plot. Applications for the letting were invited by poster, but except in this general way no notice was given or offer of a letting was made to the plaintiff; but lettings were made to a farmer named O'Brien on the dates and for the rents following:—13th March, 1915, at £1 5*s.*; 15th December, 1915, for the year at £2 10*s.*; and 10th May,

1917, at £1 2*s.* 6*d.* The plaintiff appears upon becoming aware of the lettings to have made offers of £1 5*s.*; £2 5*s.*; and 15*s.* for the corresponding periods, but his offer in respect of the first letting was not received until after 13th March, 1915, the date upon which the council made the first letting to O'Brien. In these circumstances the plaintiff issued a civil bill against the council for £20 damages "for that the defendants being under a statutory obligation under the Labourers Acts to provide a plot of land and cottage for plaintiff refused to provide such; and for that defendants being under a statutory obligation to give plaintiff a preference in the allotting of a plot of land in the townland of Fortstewart refused to give plaintiff the said preference, and gave the plot in question to one James O'Brien who did not sign a representation, and who was not under the said Acts entitled to said plot."

The learned and experienced County Court Judge for Donegal held that plaintiff was entitled to damages and gave a decree for £9. The defendants duly appealed from this decree to the judge of assize, and upon the hearing of the appeal Mr. Justice Gibson, at the request of the counsel for the defendants, agreed to state a case for the opinion of this Court, it being arranged that if plaintiff was held to be entitled to damages the £9 was to be accepted as the amount.

After careful consideration we have arrived at the conclusion that it is not possible to distinguish this case upon its material facts from those which were proved in the case of *Tevlin* v. *Lisnaskea Rural District Council* (1). In truth the present case has features which were absent in that case, and which so far as they affect the legal position would seem to fortify the claim of the plaintiff. In *Tevlin's Case* (1) the District Council refused to acquire the particular site suggested for acquisition by his representation, but included in their scheme the particular site in the same locality suggested by another applicant in his representation. The second applicant having left the country subsequently to the framing of the scheme, the council made a letting of the plot originally intended as a site for the erection of a cottage for him to a third person, who, although an agricultural labourer, was not qualified

(1) [1914] 2 I. R. 15.

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under the Act of Parliament, as no proof was given that his house was unfit for habitation; and it was in respect of their failure to regard his preferential claim to this letting that Tevlin's action was brought. In the present case M'Daid's representation was adopted by the defendants, and the particular site suggested therein was included in their scheme and subsequently acquired by them. In *Tevlin's Case* (1) no proof was given that the District Council had framed any regulation under section 29 of the Labourers (Ireland) Act, 1906; whereas in the present case regulations were framed and adopted by the council upon January 28th, 1910, and confirmed by the Local Government Board upon April 27th following. These regulations provide by clause 1: "Each cottage and plot shall be let only to an agricultural labourer within the meaning of the Labourers Acts." Clause 2 provides that "in the first letting of any cottages or allotments comprised in a scheme, preference shall be given to agricultural labourers who have signed in their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made, unless the applicant has in the meantime ceased to be an agricultural labourer," while clause 13 is as follows: "Every tenancy is created in pursuance of and subject to the provisions of sect. 13 of the Labourers (Ireland) Act, 1883 (46 & 47 Vict. c. 60), and the enactments incorporated therewith and amending the same." In *Tevlin's Case* (1) the complaint was that his claim to a preference under sect. 29 in the Act of 1906 had been ignored by the council in favour of a man who, although admittedly an agricultural labourer, had made no representation, nor was any proof given that his house was unfit for habitation. In the present case the claim of plaintiff for preference was ignored in favour of a farmer who admittedly was not an agricultural labourer within the meaning either of the Acts themselves or of the regulations. This removes out of the present case two questions that were referred to in the case of *Marron* v. *Cootehill Rural District Council* (2) in the House of Lords. The first of these was as to the nature of the preference to which a right is conferred by sect. 29 of the Act of 1906 upon labourers by or on whose behalf a representation has

(1) [1914] 2 I. R. 15. (2) [1915] A. C. 792; [1915] 1. R. 216.

been signed. We are satisfied that *Marron's Case* (1) is an express decision to the effect that the section confers no absolute preference upon such a labourer to any particular cottage, plot, or allotment, but only a right to be preferred for some one cottage, plot, or allotment in the scheme as against all other persons, including any other agricultural labourer by or on whose behalf no representation has been made unless the council is satisfied in the bona fide exercise of its powers that the need for a cottage or allotment in the case of such other labourer is more urgent. This latter point does not arise in the present case, as the person preferred to the plaintiff was a farmer, and therefore altogether outside the application of the Acts. The second question was as to whether a claim like the present would lie at all unless and until the regulations prescribed by section 29 had been duly made, or, in other words, whether the claim for preference was based upon the statute or upon the regulations—a question which is also entirely out of this case, in view of the fact that the regulations were made, and in view of the particular clauses already cited contained in these regulations. It necessarily follows that *Tevlin's Case* (2), which is a decision of high authority by this Court, being the unanimous decision of a Court consisting of Palles C.B., Madden J., and Kenny J., is absolutely binding upon us unless and until it can be distinguished upon its facts or has been reversed by a higher Court.

It was strenuously argued before us upon behalf of the defendants that there was an essential distinction of fact, inasmuch as in the present case the letting was a temporary one merely of a plot without a cottage, under sect. 15 of the Labourers (Ireland) Act, 1886, pending the erection of the cottages, the building of which had been suspended owing to the impossibility of their erection at the maximum cost prescribed by the Local Government Board; and that section 29 of the Act of 1906 therefore did not apply, being confined in its application to cottages and allotments, and that the word "allotments" in this section did not include plots intended as sites for cottages, but only land purchased by agreement and intended as plots for existing cottages. Counsel for the plaintiff, on the other hand, while apparently admitting

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the distinction of fact between this and *Tevlin's Case* (1), contended that "allotments" in sect. 29 included plots compulsorily acquired by the council under their scheme as sites for cottages, and that in any event no letting could be made under sect. 15 of the Act of 1886 to anyone who was not an agricultural labourer within the meaning of the labourers' code. This latter contention is manifestly sound, and indeed was expressly conceded by counsel for the defendants, but in our opinion it is of no avail for the plaintiff; for while it may be law, as was decided in *Tevlin's Case* (1), that any one member of the limited class designated and ascertainable under sect. 29 of the Act of 1906, namely, agricultural labourers, by or on whose behalf a representation has been duly made, has a personal action for damages against the district council if they fail to provide for his preferential claim under their scheme, it by no means follows that a similar right would exist in the case of a temporary letting under sect. 15 of the Act of 1886. The grievance resulting in that case from a letting to some person other than an agricultural labourer would be common to the whole class in Ireland, numbering many thousands, and it would be absurd if in the case supposed each one of these thousands had a separate and distinct claim for damages against this particular district council. I find, however, upon an investigation of the facts in *Tevlin's Case* (1), that the assumed distinction does not exist, because in that case, as in the present, the letting was a temporary one under sect. 15 of the Act of 1886 of a plot intended as a site for and an addition to a cottage, pending its erection under the scheme. I further find that in *Tevlin's Case* (1) the same point was raised on behalf of the district council, for counsel on their behalf argued (see top of page 20 of the report), "the letting here was not the letting referred to in sect. 29 of the Act of 1906, but a temporary letting under sect. 15 of the Act of 1886"; and the reply of counsel for the plaintiff will be found on page 21: "The plaintiff is entitled to preference, not merely in the first letting of the cottage when built, but also in the first letting of the allotment," under sect. 29 of the Act of 1906. The only reference to this particular question in the judgment of Palles C.B. is to be found on page 25 of the

(1) [1914] 2 I. R. 15.

report, and is as follows:—"It is true that the letting was made before the cottage was built, but such a letting was authorized under sect. 15 of the Act of 1886, and sect. 29, sub-s. 2, of the Act of 1906 confers a preference on the labourer on whose behalf a representation is made on the first letting of 'an allotment' as well as on that of 'a cottage.'"

We therefore regard *Tevlin's Case* (1) as an express decision to the effect that a temporary letting under sect. 15 of the Act of 1886 is a letting of an allotment within the meaning of sect. 29 of the Act of 1906, for, had it been otherwise, the case could not have been decided in the plaintiff's favour. Mr. Henry K.C. finally argued that, while the House of Lords did not in *Marron's Case* (2) expressly overrule *Tevlin's Case* (1), it did so by direct implication, and he relied for this purpose upon several passages in the judgments especially of Lords Haldane, Dunedin, Parker, and Parmoor. They undoubtedly contain dicta tending to discredit the proposition that a grievance of the nature of that of which the plaintiff in this case complains could ever form the basis of a personal claim for damages, which to that extent undoubtedly seem to conflict with *Tevlin's Case* (1). But they do not constitute the ratio decidendi, which, as I have already pointed out, is confined to two principles: first, that under sect. 29 of the Act of 1906 there is no preferential right to a particular cottage or allotment; and second, that the preference conferred is only to some one cottage or allotment within the scheme, qualified by a right on the part of the council in the bona fide exercise of their powers to ignore this preference in favour of an agricultural labourer whose needs are more urgent than those of any member of the preferred class.

There is some force in the argument that the claim in this case is based upon an alleged right of preference for a particular allotment, but not more than in *Tevlin's Case* (1); and in this case we feel at liberty to disregard the form in favour of the substance, and to treat the cause of action as one for damages by reason of the defendants having, in breach of their statutory duty, ignored the claim of the plaintiff, as one of a designated class, to the letting of "an allotment" included in the scheme. In *Marron's Case* (2) the

(1) [1914] 2 I. R. 15. (2) [1915] A. C. 792; [1915] 1 I. R. 216.

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cottage was let to a person who was admittedly an agricultural labourer, whereas in the present case the letting was made to a farmer in direct violation, not merely of the Acts of Parliament, but also of their own regulations made by the defendants under sect. 29 of the Act of 1906. In *Marron's Case* (1) the decision in *Tevlin's Case* (2) was cited and relied upon for the plaintiff, and is referred to specifically in the judgment of Lord Atkinson, but nowhere is it referred to with disapproval, and it is, therefore, impossible to say that it has been expressly or impliedly overruled. For us, therefore, to dissent from a previous decision of our own Court would be contrary to precedent and unbecoming, more especially as our decision is not final, and as we would thereby deprive a very humble but deserving class in the community of the only practical redress that is open to them for the abuse by these local bodies of their statutory powers and duties —an abuse of which we have judicial notice in frequent and flagrant cases. We have not overlooked the right in such cases to proceed by way of information for a declaration or injunction; but except in cases in which the Attorney-General interferes ex officio, the suggestion of such a costly and tedious remedy to the poorest and humblest class in the community would be equivalent, in the majority of cases at least, to a denial of justice. Every fact essential for the foundation of such a claim seems to exist in the present case. The defendants, without any apparent explanation or excuse, were guilty of a distinct violation of their statutory duty, not merely under the Act of Parliament, but also under their own regulations, by deliberately ignoring the right of the plaintiff as one of a limited and designated number of agricultural labourers to preferential consideration on the occasion of the first letting of allotments under the scheme; and this breach of duty has resulted in loss and damage to him to an amount which by consent is to be measured at the sum of £9, as fixed by the County Court Judge. The Labourers (Ireland) Acts were intended to relieve the agricultural labourer from a condition of hopeless and squalid poverty, and a cheap and simple process of this kind in the local County Court seems to be the only effective method whereby an individual member of the preferred class can

(1) [1915] A. C. 792; [1915] 1 I. R. 216. (2) [1914] 2 I. R. 15.

assert his claim under sect. 29, which was intended not only, as Palles C.B. points out, as an invitation to him to apply, but also as an assurance that the application would, all other things being equal, be preferred. We are, therefore, forced to the conclusion that if it had been the opinion of the House of Lords in *Marron's Case* (1) that failure upon the part of the district council to comply with the provisions of the section or with their own regulations made under it could never in any circumstances supply a cause of action for damages to an individual member of the class entitled to be preferred, they would have decided the case on that ground, as upon that assumption all other questions would have been largely academic. Accordingly, we shall follow the decision in *Tevlin's Case* (2); and in reply to the questions submitted to us by Mr. Justice Gibson find—1, that the action was maintainable; 2, that the decree be affirmed: and we give the plaintiff the costs of this hearing, measured at £10.

The defendants appealed (3).

Henry K.C. and *A. E. Wood*, for the appellants:—

The letting was not made under sect. 29 of the Labourers (Ireland) Act, 1906. It was made under sect. 15 of the Labourers (Ireland) Act, 1886. The letting by the council was not, therefore, restricted to persons who made representations. A letting to a person outside the class of agricultural labourers does not confer on a member of the class or on a person who made a representation a right to maintain an action for damages. *Tevlin* v. *Lisnaskea Rural District Council* (2) was impliedly overruled by the House of Lords in *Marron* v. *Cootehill Rural District Council* (1). *Tevlin's Case* (2) is not binding on the Court of Appeal. *Condon* v. *Mitchelstown Rural District Council* (4), decided by the Court of Appeal subsequent to the decision of *Tevlin's Case* (2) by the

(1) [1915] A. C. 792; [1915] 1 I. R. 216.
(2) [1914] 2 I. R. 15.
(3) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.
(4) [1914] 1 I. R. 113, 118.

Appeal. 1918.

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King's Bench Division, decided that the labourer had no right to maintain an action for damages when the scheme had not been carried out in its entirety.: Holmes L.J., pp. 216 and 212.

Wylie K.C. and *E. J. Kelly*, for the respondent:—

"Allotment" is not a word of art. It means the plot as acquired before the erection of the cottage, or a plot apart from a cottage: Labourers (Ireland) Acts, 1883 (46 & 47 Vict. c. 60), sects. 6, 13; 1886 (49 & 50 Vict. c. 59), sect. 15; 1896 (59 & 60 Vict. c. 53), sect. 5; 1906 (6 Edw. 7, c. 37), sect. 9, sub-s. 1.

By sect. 29, sub-ss. 1 and 2, of the Labourers (Ireland) Act, 1906, preference must be given to representators in the first letting. Temporary lettings under sect. 15 of the Labourers (Ireland) Act, 1886, must be to agricultural labourers, with a preference to representators.

Tevlin's Case (1) applies. *Chaplin* v. *Hicks* (2) decides that an action lies against a person for depriving another of the chance of securing a benefit.

In reply to the Court they suggested that the civil bill should be amended so as to read as follows:—"Damages for that the defendants, being under a statutory obligation to give the plaintiff (as being a member of an ascertained class of representators) a preference on the first letting, refused to take into consideration the plaintiff's preferential right, and made a letting of said plot to a person incapacitated by statute from taking the same."

June 10.

RONAN L.J.—

There are two passages in the case stated which I wish to add to the statement of facts contained in the judgment of the Lord Chief Justice. The first is that the defendants declined to authorize allotments, and the second is the following statement by Mr. Justice Gibson:—"I expressed no opinion on the question of law raised, but pointed out the difficulty from the right claimed relating to a house and land as one entity, and from the failure to provide the house being attributable to causes beyond the defendants' control." Subject to the addition of this passage I refer to the judgment of the King's Bench Division, delivered

(1) [1914] 2 I. R. 15. (2) [1911] 2 K. B. 786.

by the Lord Chief Justice, as a full statement of the facts in this case, and the questions arising in it; and I wish my present judgment to be taken as a supplement to this judgment. It appears from it that there are really two questions in the case: 1, Whether the preferential right given by sect. 29 of the Act of 1906 applies to a letting under sect. 15 of the Act of 1886; and, 2, Whether, if it does, a grievance of the nature of that of which the plaintiff in this case complains could ever form the basis of a personal claim for damages.

The late Lord Chancellor, who is not here to state his reasons, has intimated to us that he agrees with our decision, and he has authorized me to say that his view is based entirely on the ground that the preferential right given by sect. 29 of the Act of 1906 does not apply to lettings made under sect. 15 of the Act of 1886. He does not, however, express any dissent from the view taken by us on the second question.

I shall now proceed to deal with the two questions.

As to No. 2, the judgment of the Lord Chief Justice says: "They" [the judgments of Lords Haldane, Dunedin, Parker, and Parmoor in *Marron's Case* (1)] "undoubtedly contain dicta tending to discredit the proposition that a grievance of the nature of that of which the plaintiff in this case complains could ever form the basis of a personal claim for damages." He does not refer to the judgments of Lord Atkinson and Lord Sumner. This shows that he had considered *Marron's Case* (1) with minute care. That case does not affect the first question. The King's Bench Division, however, held that *Tevlin's Case* (2) was an express decision on both questions, that it could not be distinguished, that it was not overruled by *Marron's Case* (1), and that it was absolutely binding on that Court.

The English Court of Appeal, in *Ammonia Soda Company* v. *Chamberlain* (3), took exactly the same view of the effect of dicta of the House of Lords on decisions binding on the Court of Appeal. Speaking for myself, I think the reasoning of the Lord Chief Justice on this matter is conclusive, and if *Tevlin's Case* (2) were binding upon this Court, as it was on the King's Bench

(1) [1915] A. C. 792; [1915] 1 I. R. 216. (2) [1914] 2 I. R. 15.
(3) [1918] 1 Ch. 266.

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Division, I should have adopted his decision. However, we cannot treat *Tevlin's Case* (1) as binding upon us. It is our duty to reconsider it as to both questions; and in reference to the second, to have due regard to the effect of the judgments of the House of Lords. My own impression from reading his judgment is that if the Lord Chief Justice had not felt bound by *Tevlin's Case* (1) he would have decided both questions the other way.

Does the preferential right given by sect. 29 of the Act of 1906 apply to lettings made under sect. 15 of the Act of 1886? Sect. 15 of the Act of 1886 provides : "Where an improvement scheme, confirmed by a provisional order made pursuant to the said Acts, has become absolute, nothing in the said Acts contained shall be construed to prevent the sanitary authority from forthwith letting an allotment to an agricultural labourer and permitting such labourer to enter into occupation of the same, notwithstanding that the cottage to which the same is intended to be allotted has not yet been erected." Sect. 29 of the Act of 1906 requires careful consideration to see whether it applies to a letting like this. Sect. 29, sub-s. 1, provides: "The district council shall make regulations with respect to the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the letting thereof, and generally for carrying the provisions of the said Acts into effect." We have it found as a fact that the scheme, in this case, did not provide for allotments at all. We have regulations made by the district council, and approved of by the Local Government Board, and it will be seen that they make no provision for the rent of allotments. Sub-s. 2 is very important. It says: "Regulations under this section shall provide that, on the first letting of any cottages or allotments comprised in the scheme, preference shall be given to agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made." Only cottages are comprised in this scheme. Sub-s. 3 seems to me conclusive on this question. It provides: "Regulations under this section shall contain a schedule of rents to be reserved in lettings, and

(1) [1914] 2 I. R. 15.

those rents shall be so fixed as to secure a reasonable return, having regard to the circumstances of the locality affected, on the expenditure of the council under the Labourers Acts." Is it not plain that this is a financial regulation to provide that the rents to be reserved in lettings under sub-s. 3 (which are the lettings under sub-s. 2) shall be such as to secure a reasonable return on the expenditure, having regard to the circumstances of the locality?

The regulations made by the Milford Rural District Council contained a schedule of rents, and they are: cottage and plot of one acre of land or thereabouts attached thereto, one shilling and sixpence per week; cottage and plot of half an acre of land or thereabouts attached thereto, one shilling and fourpence per week. There the only rents provided for are for cottage and plot. Mr. Justice Gibson points out the difficulty from the right claimed relating to a house and land as one entity. How is it possible to say that the letting, pending the erection of the cottage, of land for which no rent is provided in the regulations comes within the section? It would be monstrous to charge for the land without the cottage the rent which is fixed for cottage and plot. The rent to be fixed shall be such as to give financial stability to the scheme and make it self-supporting. It is impossible to say that a mere temporary letting pending the erection of the cottage can be regarded as a letting under sub-s. 2. For these reasons, I am of opinion that the terms of the letting, the form of the regulations, and the words of the financial clause being wholly inapplicable, this is not a case which comes within sub-s. 2, and that it obviously cannot come within sub-s. 3 of sect. 29. We, therefore, hold that the preferential right given by that section does not apply to lettings under sect. 15 of the Act of 1886.

On the first question the Lord Chief Justice, referring to *Tevlin's Case* (1), says:—[The Lord Justice read from the judgment, ante, p. 7, from the words "It was strenuously argued before us" to the words "decided in the plaintiff's favour" on p. 9, ante].

It seems to me that the Chief Justice's own view was plainly the other way, and that he decided as he did in obedience to the case by which he thought he was bound.

(1) [1914] 2 I. R. 15.

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On the second question the Lord Chief Justice says it would be absurd to hold that each one of the whole class of agricultural labourers had a right of action. I intend to show, from the judgment in *Marron's Case* (1), that precisely the same principle applies where only a smaller class is affected, and the right is common to the whole of that class. I cannot see why one member of a class should be entitled to bring an action while every other member of the class sustains as much injury as he. In his judgment in *Tevlin's Case* (2) Palles C.B. says:—"We have, then, in this code for the benefit of agricultural labourers a sub-class of these agricultural labourers singled out as entitled to special favour." That is the sub-class described by what Lord Atkinson calls the "rather ineuphonious name of representators." We have, therefore, two classes, one being a sub-class of the other, viz. (*a*) agricultural labourers; (*b*) agricultural labourers who are representators.

The letting, whether under sect. 15 of the Act of 1886, or under sect. 29 of the Act of 1906, must be made to a member of class (*a*). The making of a letting to a farmer, as in the present case, is in a sense a breach of statutory duty to class (*a*), and therefore in a sense to every member of that class, as every member of that class had a right to be preferred to the farmer. How does the position of class (*b*) differ from this? Simply that every member of class (*b*) had also a right, caeteris paribus, to be preferred to members of class (*a*) who were not also members of class (*b*). Before considering *Tevlin's Case* (2) particularly, I wish to state some propositions as to the state of the law after the decision of the House of Lords in *Marron's Case* (1); these propositions were, I may say, all accepted by Mr. Wylie and Mr. Kelly; at any rate, I am of opinion that they are involved in the House of Lords' decision. They are as follows:—Cottages or allotments may be given to agricultural labourers. They are not to be given to anyone else. A preference is to be given to representators. A representator has no specific claim to any particular cottage or allotment.

The preferential benefit is given to all the representators in respect of all the cottages and allotments in the scheme. No

(1) [1915] A. C. 792; [1915] 1 I. R. 216. (2) [1914] 2 I. R. 15, at p. 27.

exclusive right is given to all or any of the representators to all or any of the cottages. The preferential right is only a right to be preferred caeteris paribus to agricultural labourers who are not representators. It is not an absolute preference. The council have full power to pass over all the representators and give the cottages and allotments to other agricultural labourers. It may in some cases be their duty to do so. They are bound to consider each case on its merits and to decide accordingly. It appears to me that the application of the statutory preference only arises when they have arrived at the conclusion that they can properly give a cottage to any one of two or more labourers, and that there is no substantial ground for giving it to one more than to another. In such a case, the statutory preference would make it their duty to give it to the representators.

If we treat these propositions as law, it is impossible to sustain the judgment in *Tevlin's Case* (1).

The competitors consist of all agricultural labourers. Giving a plot to a farmer deprives all the competitors of the right to compete. It further deprives all the representators of their right to be preferred caeteris paribus to other agricultural labourers. In each case, the injury is to every member of the class. There is no special injury to any particular member. The King's Bench Division judgment shows that, in the case of the larger class, it would be absurd to hold that this would give a right of action to every competitor. The judgments in the House of Lords seem to me to apply the same principle to the smaller class.

In *Tevlin's Case* (1), the civil bill was for £50 damages "for that the defendants, the Lisnaskea Rural District Council, being under a statutory obligation under the Labourers (Ireland) Acts to provide a plot of land and a cottage for the plaintiff, refused to provide such, and for that the defendants, the said council, being under a statutory obligation to give the plaintiff a preference in the allotting of a plot of land in the townland of Derrylin, refused to give the plaintiff the said preference and gave the plot in question to the defendant, William Blake, a person who was not under the said Acts entitled to such plot, and for an injunction

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restraining and prohibiting the defendants, the said council, from permitting the said lands to be occupied by any other person than the plaintiff." The Chief Baron says, at page 23:—"I stated a case for the opinion of this Court, with a provision that the civil bill was to be treated as amended in any way necessary to show a valid cause of action, if such existed." Unfortunately he did not state what amendment would, in his opinion, give a valid cause of action. The civil bill in the present case follows the form of the civil bill in *Tevlin's Case* (1); but, having regard to the propositions I have stated, Mr. Wylie said that that could not be supported, and when asked by us to state the amendment which ought to be made, he said:—"Damages for that the defendants, being under a statutory obligation to give the plaintiff (as being a member of an ascertained class of representators) a preference on the first letting, refused to take into consideration the plaintiff's preferential right, and made a letting of said plot to a person incapacitated by statute from taking the same." Any agricultural labourer would be a member of the ascertained class and would be entitled to take the plot if given to him, but this is what the King's Bench Division treated as absurd. The principle, therefore, is this: that by giving it to a farmer, all agricultural labourers were deprived of their chance of getting a cottage, and secondly, that representators were deprived of their right to a preference over other agricultural labourers: but, in both cases, the injury was one common to all members of the class.

In *Tevlin's Case* (1) the Chief Baron awarded £50 damages. For what did he give the damages? He could not have given damages unless he thought there was an absolute right in the plaintiff to get the plot; but I find on going through his judgment that it must be based on this: that the representators had not merely a right to be preferred caeteris paribus, but an absolute right of preference. The Chief Baron treated the case as if it was the duty of the rural council to give the plot to the representators; but they had power to pass over representators and to give it to any agricultural labourer they might have considered more deserving. It seems to me that this displaces *Tevlin's Case* (1), and prevents it from being an authority.

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I wish to refer shortly to a few passages in the judgments in *Marron's Case* (1). Lord Haldane L.C. says:—"It is also possible—it is not necessary to express an opinion on the point—that such a labourer might be entitled to an injunction in a case where the council was so proceeding as to deprive him of all chance of a letting. But I am unable to find in the section language which entitles the labourer to assert title to a specific holding in a case like the present. The scheme here provided for the erection of twenty-five cottages. The right of the appellant is not to any particular cottage, but to a preference over strangers in the carrying out of the scheme as a whole. Assuming, for the sake of argument, that it was wrong to let to Kennedy, in so far as some person in the class entitled would thereby be left unprovided for, it does not follow that the appellant was injured. For he had no title to the particular cottage allocated to Kennedy, and his right might have been satisfied by the allocation of some other cottage." Lord Dunedin says:—"The plaintiff's whole case is rested upon sub-s. 2 of sect. 29 of the Act of 1906 . . . Now, it is quite clear that whatever right this gives, it cannot give a right to a specific cottage being one out of a number in a scheme. The judgment of the Irish Court of Appeal in *Condon's Case* (2) was, I think, clearly right; and if that is so it seems to me to follow that it is quite impossible to give the plaintiff damages. Granted that Kennedy was unduly preferred to him, how does it follow that someone else, with the qualification that Kennedy did not possess, may not, with Kennedy out of the way, still be preferred to the plaintiff?" Does not every word of that sentence apply to this case? "The position," he continues, "is analogous to that in decided cases where a disappointed candidate at a bursary election has failed to secure damages against the electing body, even although the person actually elected, being ineligible, was not found able to hold the bursary." That analogy is complete.

Mr. Wylie relied on *Chaplin* v. *Hicks* (3). The point of that decision is stated at page 795, where Fletcher Moulton L.J. asks: "Is expulsion from a limited class of competitors an injury? To my mind there can be only one answer to that question; it is an

(1) [1915] A. C. 792; [1915] 1 I. R. 216. (2) [1914] 1 I. R. 113, 118.
(3) [1911] 2 K. B. 786.

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injury, and may be a very substantial one." That is to say, where the plaintiff had a right to belong to a limited class of competitors for a prize, and was deprived of the opportunity of submitting herself to the judgment of the tribunal that awarded the prizes, she had a good cause of action; but that is not this case. The case of *Chaplin* v. *Hicks* (1) put side by side with this case makes it perfectly clear that the election of an unqualified person to an office does not give a right of damages to every person who would be a qualified candidate; but if a qualified person comes up to be examined and is excluded from the examination he has a good cause of action. In *Chaplin* v. *Hicks* (1) the plaintiff was a competitor in a group of fifty, from which twelve were to be selected for engagements; and in violation of the terms of the contract the defendant refused to examine the lady.

Lord Atkinson in *Marron's Case* (2) says:—"Now, the agricultural labourers, by whom or on whose behalf a representation is made, styled in the argument, for convenience sake, by the rather ineuphonious name of representators, are, no doubt, a small class, ascertained or readily ascertainable; a certain privilege is conferred upon them exclusively, and a duty towards the members of the class is imposed upon district councils different from that which the councils owe to the members of the general public." Now that is not strictly accurate; it is a duty different from that which the council owe to the general class of agricultural labourers. If the distinction was between a duty to a particular class and a duty to the public in general a question might possibly arise; but Lord Atkinson adds:—"It may well be that by reason of this fact a member of this class is entitled to sue a council in respect of their breach, in his regard, of this special duty; but the important question remains, what is the true nature and precise extent of this special duty imposed by the statute?" That is the only passage in all the judgments in the House of Lords suggesting the possibility of such an action; but it is based on the distinction between a duty to the public and a duty to a class. One is a duty to a large class and the other a duty to a smaller class. Lord Atkinson, answering the question: "What was the true nature and precise extent of the special duty imposed upon the council?"

(1) [1911] 2 K. B. 786. (2) [1915] A.C. 792; [1915] 1 I.R. 216.

said that in an individual instance a preference given to a representator over a non-representator caeteris paribus would appear to him to be a due preference, but caeteris imparibus an undue one. Lord Dunedin says:—"I confess that on first impression I was inclined to think that the preference given (which ought to be included in the regulations when made, and which I will for the moment assume, without deciding, is just as efficacious as if the regulations had de facto been passed) by sub-s. 2 of sect. 29 is an absolute preference. But on maturer consideration I have come to think that the view taken by the Court of Appeal is right, and that the mere fact of being a signatory to the representation, or one on whose behalf the representation was made, does not override all other considerations of fitness and expediency. In other words, all that it means is that caeteris paribus the council is to give a favouring consideration to the man's application." On that all the law lords agree. Lord Parker's judgment goes a great deal farther. As it is directed to this matter, it requires careful study. He assumes for the purposes of his judgment that labourers by whom representations have been made are, as a class, entitled to an absolute preference over those who have not made representations. He then says: "On this assumption the plaintiff is claiming damages for disregard on the part of the defendants of a preference to which he is entitled, not individually, but only as a member of a preferred class, and a little consideration will, I think, show that no such action is maintainable." He then puts this extreme case: "Suppose that the scheme provides for the erection of six cottages, and that there are six labourers by or on whose behalf representations have been made. When the first cottage is erected, and has to be let, the six labourers, as a class, will be entitled to a preference over any labourer not a member of the class. If the district council propose to let the cottage to a person who is not a member of the class, it will be proposing to act in contravention of the Act, and might possibly be restrained by an injunction; but if it actually did let the cottage to a person who was not a member of the class, no member of the class could prove that he was individually damaged. For non constat that the district council, if they had acted in accordance

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with the section, would have let to him rather than to any other member of the class . . . The same difficulty may be seen on examining the order made in this case by the Master of the Rolls. He declared that the appellant was entitled to the cottage in question as against the person to whom the cottage was actually let, and who was not a member of the preferred class, and he awarded £30 damages. It is clear, however, that if such declaration was right every member of the preferred class was entitled to a similar declaration, and, if damages could be properly awarded, was entitled to similar damages; and this would be an absurd result."

Assuming an absolute preference, Lord Parker uses in reference to the limited class of representators almost the same language as that used by the Chief Justice, where he said it would be absurd to give damages to all agricultural labourers.

Lord Parker's judgment shows conclusively that no such action as that in the present case is maintainable. In these circumstances, and giving full weight to the opinion of the House of Lords, we are forced to hold that the judgment on the second point in *Tevlin's Case* (1) cannot be supported.

MOLONY L.J.:—

On the 14th December, 1910, a representation on behalf of the plaintiff under form 1 in the schedule to the Labourers (Ireland) Order, 1906, was lodged with the defendants. The form was signed by three agricultural labourers, or ratepayers, in the Ramelton District Electoral Division, who represented that there was not a sufficient number of houses available for the accommodation of agricultural labourers in the above-named electoral division, and that it was the duty of the defendants to take proceedings under the Labourers Acts for the making of an improvement scheme in respect of such electoral division, and they suggested that a cottage, with a suitable plot of land attached thereto, should be built for the plaintiff on the holding of Sir H. Stewart, Bart., in the townland of Fortstewart.

This representation was subsequently considered by the defendants, and an improvement scheme embracing the representation lodged by the plaintiff was adopted.

(1) [1914] 2 I. R. 15.

An open inquiry into the scheme was then held by Mr. J. P. Brannigan, an inspector of the Local Government Board, and he, on the 16th July, 1912, made an order confirming the scheme, which order was confirmed by the Local Government Board under the provisions of sect. 6 of the Labourers Act, 1906. The scheme provided for the taking of eighty-one plots, including one on the townland of Fortstewart, in the division of Ramelton, on which plot one cottage was to be built. The defendants took the necessary legal steps, and completed the purchase of the plot on the 4th February, 1913; but the cottage could not be built, as the limit of expenditure prescribed by the Local Government Board (£170 for land and building together) would have been considerably exceeded.

The defendants then found themselves in the position of having the plot on their hands without any immediate prospect of being able to build the cottage, and they conceived it to be their duty to see what use could be made of the land in the interests of the ratepayers. They invited applications for letting by poster, and let the plot for the last three years to the highest bidder, who happened to be a farmer named O'Brien. On the occasion of each of the lettings the plaintiff sent in a tender, which, however, was lower than O'Brien's, and on one occasion it was admittedly not received until after the defendants had accepted O'Brien's offer. The defendants acted wrongly in letting the lands to a person not an agricultural labourer.

In this state of facts Mr. Wylie claims that the plaintiff is entitled by reason of sect. 29 of the Labourers (Ireland) Act, 1906, to recover damages from the defendants; and in the course of his argument, at the request of the Court, he stated his cause of action to be for damages, for that the defendants, being under a statutory obligation to give the plaintiff (as being a member of an ascertained class of representators) a preference on the first letting, refused to take into consideration the plaintiff's preferential right, and made a letting of said plot to a person incapacitated by statute from taking the same, and referred the Court to the case of *Chaplin* v. *Hicks* (1).

(1) [1911] 2 K. B. 786.

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The defendants, on the other hand, contend that the provisions of sect. 29 do not give a cause of action, and that in any event the letting in the present case was not made under that section or the regulations referred to in it, but was made entirely under the provisions of sect. 15 of the Labourers (Ireland) Act, 1886. That section provides that where an improvement scheme has become absolute, as here, nothing in the Labourers Acts shall be construed to prevent the sanitary authority from forthwith letting any allotment to an agricultural labourer, and permitting such labourer to enter into the occupation of the same, notwithstanding that the cottage to which the same is intended to be allotted has not yet been erected. It is further provided that the Land Law (Ireland) Act, 1881, shall not apply in the case of any such letting, which shall be deemed to be a letting for temporary convenience only pending the erection of such cottage, and determinable at the end of any month.

Mr. Wylie admits that in sect. 15 "agricultural labourer" means any agricultural labourer, and that he would not have a cause of action under the section, although the letting was made to a farmer, unless the provisions of sect. 29 apply to a letting made under the provisions of sect. 15.

Without considering any of the authorities, one has only to look at the terms of sect. 29 to see that it could not be meant to apply to the mere temporary letting of land without a cottage under the provisions of sect. 15. Sect. 15 provides for doing a thing when you cannot do what is to be done under sect. 29. Under sect. 29 the council is to make regulations with respect to the letting of cottages and allotments; and the section further provides that such regulations shall contain a schedule of rents to be reserved in lettings, and that those rents shall be so fixed as to secure a reasonable return—having regard to the circumstances of the locality affected—on the expenditure of the council under the Labourers Acts.

The regulations in the present case were duly made by the Local Government Board, and they contain the ordinary provisions as regards the letting of cottages, together with a schedule of rents, and also provide, in accordance with sect. 29, sub-s. 2, that on the first letting of any cottages or allotments comprised in

a scheme preference shall be given to agricultural labourers who have signed on their own behalf a representation on which the scheme was founded, or on whose behalf a representation was made.

It is clear from the scheme of this section and the regulations made under it that it only applied and came into operation where there was a cottage and an allotment to be let as one entity, or where tracts of land had been expressly purchased for the purposes of being parcelled out in allotments under the provisions of sect. 16 of the Labourers (Ireland) Act, 1885, with which we have nothing to do in the present case.

I would consequently be prepared to hold that sect. 29 has no bearing whatever on the provisions of sect. 15, and that the plaintiff in the present case would not be entitled to recover; and it appears to me that the King's Bench Division would also have so held had it not been for the case of *Tevlin* v. *Lisnaskea Rural District Council* (1). The Court below held themselves bound by the decision in *Tevlin's Case* (1), and I agree with the judgment of the Lord Chief Justice on this point. We, however, are not only entitled but bound to consider whether or not *Tevlin's Case* (1) was rightly decided, and I have come to the conclusion, for substantially the same reasons as have already been given by my colleague, that it is impossible to support the decision in that case.

Tevlin's Case (1) was one in which a letting had been made under the 15th section, and the Chief Baron held that where land has been acquired by a rural district council under an improvement scheme made under the Labourers Acts founded on a representation made on behalf of an agricultural labourer, such labourer has an action for damages against the district council if the latter are guilty of a breach of the statutory obligation under sect. 29 of the Labourers (Ireland) Act, 1906, to give him a preference of a first letting of a cottage or allotment. The Chief Baron held that the provisions of sect. 29 of the Labourers (Ireland) Act, 1906, applied to a temporary letting under sect. 15 of the Labourers (Ireland) Act, 1886. I cannot see that sect. 29 has any application whatever to such a letting, but even if the cottage

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had been built, and if the cottage and allotment had been actually let to some person other than the plaintiff, I am of opinion that still the plaintiff would not be entitled to recover.

Tevlin's Case (1) was not considered in this Court, the appeal having been withdrawn; but a somewhat similar point arose in the case of *Marron* v. *The Cootehill, No.* 2, *Rural District Council* (2), which was fully discussed both here and in the House of Lords (3). In that case, the district council had acquired land under an improvement scheme made under the Labourers (Ireland) Acts, and founded on representations made by certain agricultural labourers, of whom the plaintiff was one. When eight cottages out of a large number comprised in the scheme had been built, the council allotted one of them to a labourer who had not signed any of the representations on which the scheme was founded, but whose needs for a cottage were pressing, and the plaintiff then brought an action against the council to establish his alleged preferential right to a cottage, under sub-s. 2 of sect. 29 of the Labourers (Ireland) Act, 1906. The Master of the Rolls decided in favour of the plaintiff, and awarded him £30 damages. That decision was reversed in this Court on the ground that the council was entitled in the bona fide exercise of its discretion to allot a cottage to the labourer whose needs were more urgent than the plaintiff's, notwithstanding that the latter had signed the representation while the successful claimant had not, and that the action should be dismissed. O'Brien L.C., in giving judgment, referring to the meaning of sect. 29, said:—"The effect of the section appears to me to be that while it affords an indication that a labourer who has signed a 'representation' is to be given some preference in the exercise of the judgment of the council over a labourer who has not signed, yet, in the exercise of that judgment, the will or the representation of the labourer cannot dominate or override the discretion of the council to the exclusion of certain statutory considerations, and I consider that not only has an individual labourer who has signed a representation, as in *Condon's Case* (4), no right to indicate a particular cottage within

(1) [1914] 2 I. R. 15.
(2) [1915] A. C. 792; [1915] 1 I. R. 216.
(3) [1914] 1 I. R. 216; [1915] A. C. 792.
(4) [1914] 1 I. R. 113, 118.

a scheme as one to be allotted to him, but also that on the true construction of sect. 29 itself and, apart from any question of fraud, dishonesty, or derogation of duty on their part, the councils have full power to exercise the discretion and power of discrimination entrusted to them in a manner which might temporarily, as in the present case, exclude a man who had signed a 'representation' in favour of another who has not signed, but whose need for a cottage was urgent."

This view, which had the full approval of Holmes and Cherry L.JJ., also commended itself to the House of Lords; and it is unnecessary to refer to the judgments of that Court further than to say that, in my opinion, they clearly establish that a labourer on whose behalf a representation has been made has no title to a specific cottage, and that the preference referred to does not preclude the rural district council from choosing as an occupant of a cottage the agricultural labourer whom they deemed to be the most suitable, although he may not have signed the representation. If, however, the claims of a person who has signed the representation and of a person who has not signed the representation are equal, then the council would be bound to give a preference to the representator.

The scheme in the present case provides for the erection of eighty-one cottages, and there are eighty-one representators. No representator has a preferential right to a specific cottage: *Condon* v. *Mitchelstown Rural District Council* (1); *Marron's Case* (2). The council act within their powers if they give a cottage to a representator, or if they give the cottage to an agricultural labourer who, though not a representator, has a claim more meritorious: *Marron's Case* (2). If, however, they give the cottage to a person not an agricultural labourer, they act ultra vires, and can be restrained from doing so; but the fact that their action is ultra vires does not entitle the eighty-one representators, who are all equally affected, or any of them, to bring a common law action for damages.

I think, therefore, that we should discharge the order of the King's Bench Division, and declare, in answer to the questions in

(1) [1914] 1 I. R. 113, 118. (2) [1915] A. C. 792; [1915] 1 I. R. 216.

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the case stated, that the action is not maintainable, that the decree should be reversed, and the action dismissed.

Solicitors for the appellants: *E. M'Fadden & Co.*
Solicitor for the respondent: *W. Kelly.*

C. L.

O'MALLEY *v.* CONGESTED DISTRICTS BOARD (1).

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Poor-rate—Fishery—Rateability—Owners in possession—No profit from fishery—"Immediate use or enjoyment"—Poor Relief (Ireland) Act, 1838 (1 & 2 *Vict. c.* 56), *ss.* 61, 63, 124.

The Congested Districts Board, a statutory corporation, acquired, in the exercise of their powers, an estate including fishing rights. In a civil bill action brought to recover poor rate in respect of these fishing rights it was proved that the Board had formerly let the fishing at a yearly rent, but during the period covered by the rate sued for they were unable to let it, and, as a commercial undertaking, they could only work it themselves at a loss. They employed men for the purpose of watching the fishery.

Held (affirming the King's Bench Division), that the Board were in the "immediate use or enjoyment" of the fishery, and liable, as occupiers, for rates; that the true test of beneficial occupation is not whether a profit can be made, but whether the occupation is of value.

APPEAL from an order of the King's Bench Division, dated June 6th, 1918, which, in answer to the question put by Ronan L.J. in a case stated at the Mayo Spring Assizes, declared that for the purpose of rating the appellants were the occupiers of a fishery included in an estate purchased by them under the Land Purchase Acts.

The civil-bill process was brought by William G. O'Malley, rate collector, against the Congested Districts Board, claiming the

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sum of £1 3*s.* 4*d.* for poor rate in respect of the Board's right of fishing in Renagh Lough and Carrowniskey River. The County Court Judge of Mayo gave a decree for the amount, and the Board appealed. Upon the hearing of the appeal Ronan L.J. stated a case.

The only question in the case was whether the Board were "occupiers" within the meaning of sect. 61 of the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56). Sect. 124 of the Act provides that the word "occupier" shall include "every person in the immediate use or enjoyment of any hereditaments rateable under this Act, whether corporeal or incorporeal."

The case went on to say:—"There is no doubt that this right of fishing is a rateable hereditament under sect. 63 of the Act. The defendants are a statutory corporation, created by sect. 44 of the Irish Land Act, 1909, and the right of fishing is vested in them as such."

"The defendants had previously let the said fishing at a yearly rent, but they were unable to let it during the period covered by the rate sued for. Mr. Robert Duncan, an inspector of the defendants, was examined before me and deposed, and I accepted his evidence, that the class who usually rent fisheries of this nature has disappeared, at least for the present; that the defendants did not advertise it, as they considered that doing so would have no result; that as a commercial undertaking they could only work it themselves at a loss, but that they were open to offers and quite ready to let at a rent if they could find a tenant. They paid four or five farmers £9 a year between them for watching this fishery, and these men were continued in this employment during the period covered by the rate sued for.

"I found as a fact that the defendants did not and could not derive any profit from the fishery during the said period, but that they were legally in possession, and that no one else was in occupation of the fishery.

"It was suggested that the individual members of the corporation might fish; but I would submit for the consideration of the Court that the corporation is 'the person,' and as such quite distinct from its members.

"I would refer the Court to the case of the *Liverpool Corporation*

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v. *Chorley Union* (1) and the cases there cited, particularly to the judgment of Lord Atkinson at pp. 207, 208, 209, 210. I would also refer to the following Irish cases:—*Sligo Corporation* v. *Wynne* (2); *New Ross Guardians* v. *Byrne* (3); *Midleton Union Guardians* v. *M'Donnell* (4). Mr. FitzGerald Kenny appeared for the plaintiff, and argued that the defendants in the circumstances were in immediate use and enjoyment of this fishery. Mr. Leonard K.C., for the defendants, argued that there was no use or enjoyment which was, or was capable of being, beneficial."

The question for the Court was: Are the defendants occupiers of the said fishery within the meaning of sect. 61 of the said Act? The King's Bench Division (Gibson, Madden, and Moore, JJ.) answered the question in the affirmative, and from their order the defendants appealed.

Leonard K.C. and *J. M. FitzGerald*, for the appellants:—

In order to make the Congested Districts Board liable for rates on the fishery it must be shown that their occupation is a thing of value. If the occupation is not a thing of value at the material time the person in occupation is not "in the immediate use or enjoyment." The appellants are not occupiers of the fishery within the meaning of sects. 61 and 124 of the Poor Relief (Ireland) Act, 1838, and accordingly are not liable to be rated, although the right of fishing itself is a rateable hereditament within sect. 63 of the same Act. The "immediate use or enjoyment" which is rateable in Ireland is similar, at least so far as its legal character is concerned, to the "occupation" rateable in England: *Byrne* v. *City of Dublin Steam Packet Co.* (5); and this view was adopted by the House of Lords (6).

Lord Atkinson has laid down in *Winstanley* v. *North Manchester Overseers* (7) that "owners in possession are prima facie occupiers, unless it is shown that the occupation is in some one else," and that whether the occupation was a beneficial occupation—a thing of value within the meaning of the statute of Elizabeth—or not

(1) [1913] A. C. 197.
(2) I. R. 7 C. L. 465.
(3) 30 L. R. Ir. 160.
(4) [1896] 2 I. R. 228.
(5) 12 L. R. Ir. 220, per Fitz-Gibbon L.J., at p. 248.
(6) Per Lord Blackburn, at p. 251, ib.
(7) [1910] A. C. 7.

depended upon whether the occupier was or was not by law debarred from deriving any benefit from it. In *Liverpool Corporation* v. *Chorley Union Assessment Committee and Withnell Overseers* (1), Lord Alverstone C.J. said that if the House of Lords meant to lay down that "any person who owns land must be the occupier, if there is no one else in occupation, the decision on further consideration may be found to go too far." His own view of the law of rating was that an owner may be possessed of vacant land without being the occupier of it, although no one else occupied it. In *Liverpool Corporation* v. *Chorley Union* (2) Lord Atkinson in the House of Lords, referring to Lord Alverstone's observations, said: "But this House never affirmed or purported or intended to affirm any such proposition as that the owner of land (not houses) is to be held to be prima facie in the rateable occupation of it in such circumstances."

Vacant houses have been held not to be rateable; and we submit that by analogy an unused fishery like that of the appellant's is not rateable. On the authorities the following hereditaments have been held to be exempt from rateability:—a plot of unenclosed building ground not cultivated, built upon, let or used in any way: *Smith* v. *New Forest Union Assessment Committee* (3); parks dedicated to the use of the public: *Lambeth Overseers* v. *London County Council* (4); *Liverpool Corporation* v. *West Derby Assessment Committee* (5). [They also referred to: *Guardians Callan Union* v. *Armstrong* (6); *Guardians New Ross Union* v. *Byrne* (7).]

[CAMPBELL C.—Is there any distinction between an incorporeal hereditament and a tract of land? The Board themselves could not become tenants, but on the authority of *London County Council* v. *Erith, &c.* (8), they ought to be taken into account as possible hypothetical tenants; and we must consider what they themselves would be prepared to give for this right of fishing. It must not be overlooked that this river is strictly preserved by the Board.

(1) [1911] 1 K. B. 1057.
(2) [1913] A. C. 197.
(3) 61 L. T. 870.
(4) [1897] A. C. 625.
(5) [1908] 2 K. B. 647.
(6) 16 L. R. Ir. 33.
(7) 30 L. R. Ir. 160.
(8) [1893] A. C. 562.

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We say that *Guardians Midleton Union* v. *M'Donnell* (1) is an answer to your Lordship's observations. The persons employed to preserve the fishery occupy a position similar to that of a caretaker put into an untenanted house. In the *Midleton Case* (1) it was laid down by Holmes L.J. that the occupation that carries with it liability to poor rates is something different from mere legal possession. He takes an empty house as an illustration of the cases where there is no immediate use and enjoyment of the premises.

Fetherstonhaugh K.C. and *J. FitzGerald Kenny*, for the respondents, were not called upon.

SIR JAMES CAMPBELL C.:—

The question before us is an important one, and if the facts were different interesting points would arise for decision; but as the case stands it does not seem to us capable of any serious argument with the view of showing that the King's Bench Division were wrong in the decision at which they arrived.

The Congested Districts Board in the discharge of their statutory duties acquired an estate which included fishing rights of some value. Prior to the war they let the fishing to outsiders at a rent; but since the war they have been unable to dispose of it in this way; and from the clear statement of the case by Lord Justice Ronan it would seem that on the evidence he was satisfied that they were unable to make any commercial profit out of the fishery during the period in question. Is that a conclusive test? Clearly it is not so long as the hereditament retains a value. So long as it retains a value the owner or the persons in occupation as tenants are, it seems to me, upon the authorities, liable.

Mr. Leonard has sought to draw a distinction in this case by reason of the fact that all lettings of every kind, all commercial dealings at a profit, were during this period impossible; and he says he is entitled to rely by way of analogy upon the decisions exempting empty houses while they are vacant. We asked for authority showing that there was an analogy between rateable

(1) [1896] 2 I. R. 228.

property of this kind and empty houses. He was unable to give us any such authority, and from the very nature of an incorporeal hereditament it would be impossible to give an authority of that kind. The owner can never take physical possession of a right of fishing or of shooting. In popular language the question is determined by saying "he has got a right of fishing"; and it is clear that the Congested Districts Board had a right of fishing. They showed that they regarded it as a subject-matter of value; and by taking proper and prudent steps to preserve it they put themselves in the position of persons who were in the occupation and use of the particular hereditament. If that is so, then all the conditions are fulfilled: we have, first, the hereditament, a thing of value; in the second place, we have the persons sought to be made liable as owners taking elaborate steps to preserve this thing of value. The evidence leads inexorably to the conclusion that they were in occupation, and that all the elements of liability are to be found in the case. We, therefore, concur in the judgments of Gibson and Madden JJ.; and our decision is based on the facts.

RONAN L.J.:—

I agree. At the hearing of the appeal and in the case stated I was very careful to express no opinion. Five judges, three in the King's Bench Division and two here, having come to the conclusion that the plaintiff should succeed, it is no harm to say that my view, when I decided to state a case, was that the fishery was a thing of value, that the Board were in legal possession, and that when they employed and paid persons to take care of it they were in the "immediate use or enjoyment" of the hereditament. One clear proposition stated in the case is, that during the period in question they could not make a profit out of the fishery. But it is well established that the true test of beneficial occupation is not whether a profit could be made, but whether the occupation is of value: *London Co. Council* v. *Erith* (1). Mr. Leonard argued that the analogy of the empty house should be applied. In *Liverpool Corporation* v. *Chorley Union Assessment Committee* (2), Lord Atkinson, at page 211, says:—"Lord Blackburn, in *Harter*

(1) [1893] A. C. 562.
(2) [1913] A. C. 197.

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v. *Salford Overseers* (1), says that the exemption of vacant houses from rateability is a good rough rule which may work well in practice, but that he could never understand the reason why a vacant house should not be rated if there is no furniture in it. During the argument, Lord Halsbury suggested a possible construction of the Statute of Elizabeth which would afford a quite intelligible reason for the practice which is followed. It was, as I understand it, this:—The Statute of Elizabeth enumerates 'houses' as well as 'lands' in the list of properties, the occupiers of which are to be rated for the relief of the poor." Therefore, Lord Blackburn and Lord Atkinson treated the exemption of an empty house from rateability as an anomaly; and when the Lord Chancellor asked Mr. Leonard if he could produce any case in which this exemption had been extended to incorporeal hereditaments, he admitted he could not. I decline to be a party to any extension of the anomaly.

O'CONNOR L.J.:—

Prior to and during the early days of the war the defendants were in the "immediate use or enjoyment" of a fishery for which they were rated. Their case now is that they abandoned the use and enjoyment; or, rather that the use and enjoyment abandoned them. It has been admitted by counsel for the defendants that the burden of proof was upon them. The case stated has no finding on that issue; but on the facts, as presented, I am of opinion that they have not discharged this onus.

It is, I should think, possible for the owner of a right of sporting or of fishing if he finds it valueless to abandon it and leave it derelict. For practical purposes it would then cease altogether as a right; but that is very different from this case, because the defendants have, by watching and preserving and resting the river, treated it in a manner which might enhance its value. For these reasons, I concur in the judgments of my colleagues.

Solicitor for the appellants: *J. O'Connor.*
Solicitor for the respondents: *J. Moles.*

C. L.

(1) 6 B. & S. 591, at pp. 595, 597.

THE KING *v.* JOSEPH CHARLES FITT (1).

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Criminal Law—Murder—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *secs.* 103 *and* 131—*Sentence*—"*Young person*"—*Date of trial or date of crime.*

The accused was convicted of murder. When the crime was committed, he had not attained the age of sixteen. At the date of trial the accused was more than sixteen years of age.

Held, that the accused was not a "young person" within the meaning of the Children Act, 1908 (8 Edw. 7, c. 67), and that he might competently be sentenced to death.

CASE STATED pursuant to the statute in that behalf for the determination of the Court for Crown Cases Reserved by the Right Hon. Lord Justice Molony, at the Summer Assizes, 1918, for the county of the city of Belfast.

The Case Stated set out:—

At the assizes held at Belfast in and for the county of the city of Belfast, Joseph Charles Fitt was tried before me on an indictment in which he was charged that he on the 25th day of April, 1918, feloniously, wilfully, and of his malice aforethought did kill and murder one William Murray.

It was proved at the trial (*a*) that the prisoner was born on the 2nd day of June, 1902; (*b*) that the crime was committed on the 25th day of April, 1918.

The trial concluded on the 20th day of July, 1918, when the jury found the prisoner guilty of the wilful murder charged in the indictment, and strongly recommended him to mercy on account of his youth.

After the prisoner had been duly asked by the Clerk of the Crown and Peace if he had anything to say why the Court should not now proceed to pass judgment and sentence of execution upon him, and he had made a reply thereto, Mr. Thomas Harrison intervened and requested me to abstain from passing sentence

(1) Before MOLONY C.J., and GIBSON, MADDEN, DODD, GORDON, PIM, and MOORE JJ.

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until he had an opportunity of considering the effect of the provisions of the Children Act, 1908 (1), bearing upon the present case. I said that I would hear any arguments addressed to me on this subject on Monday, the 22nd July.

When the case was resumed, Mr. Thomas Harrison contended that as the prisoner was a "young person" within the definition contained in sect. 131 of the Children Act, 1908 (8 Edw. 7, c. 67)(1), at the time of the commission of the crime, having been then under the age of sixteen years, he was entitled to claim the benefit of sect. 103 of the Act and to be sentenced in accordance therewith.

Mr. John M'Gonigal K.C., and Mr. George Hill Smith K.C., on behalf of the Crown, contended that the prisoner having now attained the age of sixteen years, sect. 103 of the Children Act had no application, and that the prisoner must be sentenced to death according to the provisions of sect. 2 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100). They relied specially on sect. 123 of the Children Act as establishing their view.

(1) The Children Act, 1908, enacts, Section 103—Sentence of death shall not be pronounced on or recorded against a child or young person, but in lieu thereof the Court shall sentence the child or young person to be detained during His Majesty's pleasure, and if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the Secretary of State may direct, and whilst so detained shall be deemed to be in legal custody.

Section 123—(1) Where a person, whether charged with an offence or not, is brought before any Court otherwise than for the purpose of giving evidence, and it appears to the Court that he is a child or young person, the Court shall make due inquiry as to the age of that person, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, but an order or judgment of the Court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the Court, and the age presumed or declared by the Court to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person, and where it appears to the Court that the person so brought before it is of the age of sixteen years or upwards, that person shall for the purpose of this Act be deemed not to be a child or young person.

(2) Where in a charge or indictment for an offence under this Act, or any of the offences mentioned in the first schedule to this Act, except an offence under the Criminal Law Amendment Act, 1885, it is alleged that the person

No authorities were cited to me on either side, and the only case that I could find having any bearing on the subject was *The King* v. *Cuthron* (1).

I was of opinion that the contention on the part of the Crown was right, but having regard to the gravity of the case and the importance of the question as affecting judicial procedure, I thought it right, at Mr. Harrison's instance, to reserve a case.

I accordingly, under the provisions of 11 & 12 Vict. c. 78, postponed judgment until the questions which arise in this case shall have been determined, and committed the prisoner to Belfast Jail to await the judgment of the Court.

The questions for the determination of the Court are:—1. Is the prisoner entitled to the benefit of the provisions of the 8 Edw. 7, c. 67 (Children Act, 1908), sect. 103? or, 2. Must the prisoner be sentenced to death in accordance with the provisions of 24 & 25 Vict. c. 100 (Offences against the Person Act, 1861), sect. 2?

At the request of counsel for the prisoner, Molony C.J. added to the case the following paragraph:—

"The prisoner was arrested on the 26th day of April, 1918, and brought before the magistrates at Petty Sessions on the

by or in respect of whom the offence was committed was a child or young person, or to have been under or above the specified age, as the case may be, he shall for the purposes of this Act be presumed at that date to have been a child or young person or to have been under or above that age, as the case may be, unless the contrary is proved.

(3) Where in any charge or indictment for an offence under this Act or any of the offences mentioned in the first schedule to this Act it is alleged that the person in respect of whom the offence was committed was a child or was a young person, it shall not be a defence to prove that the person alleged to have been a child was a young person, or the person alleged to have been a young person was a child, in any case where the acts constituting the alleged offence would equally have been an offence if committed in respect of a young person or child respectively.

(4) Where a person is charged with an offence under this Act in respect of a person apparently under a specified age it shall be a defence to prove that the person was actually of or over that age.

Section 131.—For the purposes of this Act, unless the context otherwise requires . . ., the expression 'young person' means a person who is fourteen years of age or upwards, and under the age of sixteen years.

(1) [1913] 3 K. B. 168.

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following day, and returned for trial to the next assizes on the 20th day of June, 1918."

Denning K.C. and *Thomas Harrison*, for the prisoner :—

This is a case reserved by the Lord Chief Justice for the Court for Crown Cases Reserved arising upon the construction of sect. 103 of the Children Act, 1908.

The prisoner Fitt was a lad under sixteen years when he was charged with the murder of a child. He was over sixteen years of age when he was indicted, tried, and found guilty with a recommendation to mercy. After verdict and before sentence prisoner's counsel (Mr. Thomas Harrison) raised the question that the criminality of the prisoner and the nature and extent of the punishment depended on the prisoner's age at the date of his trial—that as he was under sixteen years when he committed the offence, though over sixteen when he was tried and convicted, the capital sentence could not be passed or carried out.

The learned judge thereupon consented to state a case. [Counsel read the case.]

The answer to the question whether a person under the age of sixteen at the time of the offence, and over that age at the date of the conviction, is entitled to the benefit of sect. 103 of the Children Act, 1908, depends on the construction of that section, having regard to the whole scope and object of the Act and the meaning of sect. 131. [Reads sects. 103 and 131.] The case finds that the boy was born on the 2nd June, 1902, and that the crime was committed on the 25th April, 1918. But if necessary I will ask the Court to amend the case by adding that the prisoner was arrested on the 26th April, 1918, and brought before the magistrates the following day, and returned for trial to the next assizes on the 20th day of June, 1918.

Dodd J.: Is it not sufficient for you that these are possible dates?

Denning K.C.: If actual dates, sect. 123 is out of it altogether.

Molony C.J.: Take the case as amended for the purpose of the argument.

Denning K.C.: The construction of sect. 123 of the Children Act, 1908, does not carry me the whole way [reads the section];

but if you take the words of that section, it will be seen that the period is to be ascertained at the time the accused is brought before the Court. Here the date would be the 27th April, 1918. He was a "young person" on that date.

Sect. 123 cannot be universal in its application, because if it were it would mean that wherever you have the words "child or young person," or such words in the Act, no matter what the context was, that child or young person would be excluded from the Act if over sixteen, whatever the crucial period is. [Refers to sect. 123, sub-s. 4.]

There are a number of periods of time referred to in the sections of the Act in which the age is of importance. Sect. 71, for example, uses the phrase "youthful offender" in its first sub-section dealing with disturbances in schools. "Youthful offender" is not defined, but I submit that the age in that case must be ascertained with reference to the date of the disturbance. Sect. 72 deals with a similar class of offence; but in sub-s. 2 of that section the word "child" is used, and one is again thrown back on the definition section.

In sub-s. 5 of sect. 72 the two terms are used, "youthful offender" and "child." Again, in sect. 57 it is clearly the date of the conviction that is the crucial date, but in sect. 58 it is the date of the offence. The period of time is to be calculated from different points of time in the different sections. In sect. 84 the age is at the date of the pardon. Sects. 94 and 95 refer to the date of the arrest, sect. 97 to the date the child is committed to custody, and not the date on which he is charged. Sect. 98 refers to the date of the charge. So that there is no specific period which can be applied to all cases.

Gibson J.: Sect. 103 can only refer to the court of trial.

Denning K.C.: It could not have been intended to allow the matter to be determined by the date of the trial. The trial may be adjourned or postponed on account of the illness of a witness or some other cause. Sect. 123 casts on the justices the duty of ascertaining what the age of the child is.

Regard must be had to the whole scope of the Act. What was the disease, and what was the remedy? On the face of the Act, it is clear the Legislature recognized the comparative

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irresponsibility of a person under sixteen years of age. The Act has been called the Children's Charter, and its principal object was to prevent what occurred under the old system—the turning of youthful offenders into chronic criminals. The method adopted was to substitute reformation for punishment. Death is an absolutely clear contradiction of any effort at reformation. Sect. 103 puts no stay on execution. It provides that the sentence is not to be pronounced or recorded. So far as legislation is concerned, the accused is in no better position. The prerogative of the Crown is his only hope. Alderson B. in *The Attorney-General* v. *Lockwood* (1) says :—" The rule I take it upon the construction of all statutes, and, therefore, I take it applicable to the construction of this, is, whether they be penal or remedial, to construe them according to the plain literal and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity." And in the *Proceedings against George Stratton and others* (2) it is said that " we should bear in mind the fundamental rule of criminal judicature, that the measure of punishment should be in proportion to the degree of malignity appearing in the intention of the offender " [per Ashurst J.].

[Authorities cited and discussed :—*In re Brocklebank, Ex parte Dunn & Raeburn* (3); *King* v. *Cawthron* (4).]

The Solicitor-General (*Powell K.C.*) (with him *M'Gonigal K.C.* and *George Hill Smith K.C.*), for the Crown :—

The task of interpretation does not arise. The words of the statute are plain and admit of but one meaning. If one takes the definition section (sect. 131) and substitutes the words there for the words " child or young person " in sect. 103, it is clear what the Legislature meant. It had to draw the line somewhere. On the face of the section the Legislature evidently meant the age when the Court was dealing with the offender. To get any other

(1) 9 M. & W. 398.
(2) [1799] 21 State Trials, 1291.
(3) 23 Q. B. D. 462.
(4) [1913] 3 K. B. 168.

meaning one must read words into the section that are not there. That is not allowable when the words are plain and unambiguous.

We entirely deny the theory of no responsibility below certain ages. There is a presumption which may be rebutted. After fourteen years of age, so far as murder is concerned, there is no irresponsibility. Sect. 123 clearly confirms our reading of sect. 103. Even if the child were under sixteen, the crime is still murder. The section does not change the quality of the act at all.

MOLONY C.J. delivered the judgment of the Court:—

The prisoner, Joseph Charles Fitt, was tried before me at the last Belfast Assizes for the wilful murder of William Murray, and the jury found him guilty on the 20th July, 1918. It was proved at the trial that the prisoner was born on the 2nd of June, 1902, and that the crime was committed on the 25th of April, 1918; consequently, the prisoner had attained the age of sixteen years at the time of the conviction.

Mr. Denning and Mr. Thomas Harrison, on behalf of the prisoner, have contended that, as he was a young person within the definition contained in section 131 of the Children Act, 1908 (8 Edw. 7, c. 67), at the time of the commission of the crime, he was entitled to claim the benefit of section 103 of the Act, and to be sentenced in accordance therewith.

Section 103 provides that sentence of death shall not be pronounced on or recorded against a child or young person; but in lieu thereof the Court shall sentence the child or young person to be detained during His Majesty's pleasure, and if so sentenced he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the Secretary of State may direct, and while so detained shall be deemed to be in legal custody.

By sect. 131, the expression "young person" is defined to mean a person who is fourteen years of age or upwards and under the age of sixteen years.

The words of sect. 103 appear to us to be applicable to the time when the judge comes to pronounce sentence. He is then to ask himself whether the prisoner, as he stands in the dock, is a child or young person within the definitions contained in sect. 131,

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and if he is not a child or young person at that time, he is not entitled to the benefit of the Act. Mr. Denning, however, contends that when the whole scope and object of the Act is examined, the section could not have this construction. He points out that a main purpose of the Act was to prevent youthful offenders from being turned into criminals, and to substitute as far as possible in our criminal procedure reformation for punishment. He further relies on the fact that the Act takes cognizance in many places of the comparative irresponsibility of persons who are not over the age of sixteen years, and that a construction of sect. 103, which compels a judge to sentence a prisoner to death, although the prisoner was not sixteen years of age at the time of the offence, could never have been contemplated by the Legislature.

On the other hand, it is contended by the Solicitor-General that there was no intention on the part of Parliament to alter the quality of the crime, but only to mitigate the punishment, and that the words of the section carried out the intention of the Legislature.

In deference to Mr. Denning's very able argument, we have carefully considered all the sections of the Act, and we are agreed that they lead to a conclusion different from that for which he had so strongly contended. The Act was meant to be a complete code as regards offences by or against children, and has been called not inaptly "the Children's Charter." It is divided into six parts, and it is necessary to glance at the different parts in order to see the scheme of the Act. Part I deals with the protection of infant life, and contains many valuable provisions with that object.

Part II deals with the prevention of cruelty to children and young persons, and many of its sections show that the Legislature had perfectly before its mind the distinction regarding the age at the time the offence was committed, and at the time of conviction. For instance, there are certain sections which deal specifically with the age at the time of the offence, and there are other sections which point specifically to the time when the prisoner is brought before the Court. Take, for example, sect. 12, which provides a penalty to be imposed on any person over the age of sixteen years who has the custody, charge, or care of any child or young person,

and who wilfully assaults, illtreats, neglects, abandons or exposes such child or young person. Similarly, sect. 15, which provides a penalty for any person over the age of sixteen years who has the custody, charge, or care of any child under the age of seven years, and who exposes that child to the risk of burning. It is quite clear in these instances that the offence can only be committed by a person over the prescribed age at the time of the commission of the offence.

Part III, which relates to juvenile smoking, does not afford us any assistance; but Part IV, which deals with Reformatory and Industrial Schools, is valuable as showing, in several sections, that the age of the child was to be ascertained as of the date when he was sent to a reformatory or industrial school, and had no relation to the age at which the offence was committed. For example, sect. 57 provides that if a youthful offender "who in the opinion of the Court before which he is charged is twelve years of age or upwards but less than sixteen years of age" is convicted . . . the Court may, in addition to, or in lieu of, sentencing him according to law to any other punishment, order that he be sent to a certified reformatory school.

Sect. 58, which deals with sending to industrial schools persons under the age of fourteen years who come within certain descriptions, is to the same effect, and there are many other sections in Part IV which expressly relate to the time when the Court makes its order.

On a comparison of Parts II and IV it is clear that in one set of instances the Legislature had before its mind the time of the commission of the offence, and in another set of instances the time at which the judgment of the Court was to be pronounced.

We now come to Part V, which is intended to contain a code of procedure for all cases of juvenile crime. Sects. 94, 95, and 96 provide for what is to be done on the apprehension of a person who is under the age of sixteen years, and before he is brought before a Court of summary jurisdiction. Sects. 97, 98, 99, and 101 deal with the procedure which is to be followed when a case against a child or young person is disposed of at Petty Sessions, or when he is remanded or committed for trial, and clearly deal with the age of the accused when he is brought before the Court.

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Sects. 102, 103, 104, and 106 deal with restrictions on the punishment of children and young persons, and each of them specifically points to the age of the person at the time the sentence of the Court is pronounced.

We are satisfied, not only from the words of sect. 103 itself, but from its context, and indeed from the whole scheme of the Act, that the meaning of the Legislature was that only persons under the age of sixteen at the time of sentence are entitled to the benefit of the section. This view finds strong support in sect. 123, on which the Crown has relied. The section provides for the Court making inquiries as to the age of the person who is brought before it, and enacts that the age presumed or declared by the Court to be the age of the person so brought before it shall, for the purposes of the Act, be deemed to be the true age of that person, and where it appears to the Court that the person so brought before it is of the age of sixteen years or upwards, that person shall, for the purposes of the Act, be deemed not to be a child or young person.

In the present case it was proved at the trial that the accused was then of the age of sixteen years, and consequently sect. 123 is an express statutory provision against treating the accused as a young person, and giving him the benefit of sect. 103. It was contended that sect. 123 applied to the time when the accused was brought before the magistrate on the 27th April, 1918, and that as he was then under the age of sixteen years he was entitled to the benefit of sect. 103. It is quite true that at the time the prisoner was remanded at Petty Sessions he was under the age of sixteen years, and under sect. 97 the magistrate had to take this into account, and to commit him to custody in a place of detention instead of a prison; and similarly, under sect. 103, when the judge at the trial came to sentence him, the judge had also to inquire whether he was then under the age of sixteen years, but if he was not then under that age, sect. 103 ceased to have any application.

In *The King* v. *Cawthron* (1) it was decided that an offender against sect. 4 of the Criminal Law Amendment Act, 1885, whose age exceeded sixteen years at the date of the conviction, though he was under sixteen at the date of the offence, is not "an offender

(1) [1913] 3 K. B. 168.

whose age does not exceed sixteen years" within the meaning of that section, and could not, therefore, be sentenced to be whipped. Mr. Justice Darling in delivering the judgment of the Court (Darling, Rowlatt, and Atkin JJ.) contrasts the words of sect. 4 of the Criminal Law Amendment Act, 1885, with sect. 123 of the Children Act, 1908, and said:—"The question which we have to decide is whether the appellant was a person under the age of sixteen years within the words of the proviso. The words of the section are 'whose age does not exceed sixteen years,' not 'whose age did not exceed sixteen years' at some earlier date, and the words must be taken as referring to the time at which the person is brought before the Court and convicted. Mr. Raikes argued that if the Legislature had meant to refer to the date when the offender was brought before the Court they would have said so clearly, as they did in sect. 123 of the Children Act, 1908. It is true that sect. 4 of the Act of 1885 does not in terms refer to the time when the offender 'is brought before the Court,' but I think that that is what it means. In the course of the argument I put to Mr. Raikes an extreme case of a boy of the age of fifteen years committing an offence under this section and then running away and evading prosecution until after the lapse of twenty years, and I asked whether upon conviction at the age of thirty-five he could be ordered to be whipped. He was obliged to contend that he could."

In the present case, when Mr. Denning was specifically asked what would have happened if a person under the age of sixteen committed murder and evaded prosecution for twenty years, he had to admit that upon his argument the only thing that a Court could do would be to sentence him to detention under sect. 103.

Up to this morning we thought the case of *The King* v. *Cawthron* (1) was the only case which threw any light on this subject, but I have been furnished this morning by Mr. Hugh J. M'Cann, one of the Court reporters, with a copy of "The Scottish Law Reporter" of October 23rd, 1918, the issue of the current week. I am very glad indeed to acknowledge the assistance which the case therein referred to has given to me, and to all of us, more especially as it affirms the view which we had all previously come to without any knowledge of that case.

(1) [1913] 3 K. B. 168.

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It was a case that came before the High Court of Justiciary in Scotland: *H. M. Advocate* v. *Crawford* (1). The note of the case in the current issue is as follows:—

"Justiciary Cases—Children Act, 1908 (8 Edw. 7, c. 67), sects. 102 (2) and 131.—Sentence.—'Young person.'—Date of Trial or date of Crime.

"The Children Act, 1908, enacts—sect. 102 (2)—'A young person shall not be sentenced to penal servitude for any offence.' Section 131—'For the purposes of this Act, unless the context otherwise requires . . ., the expression 'young person' means a person who is fourteen years of age or upwards and under the age of sixteen years.

"An accused was convicted of culpable homicide upon an indictment for murder. When the crime was committed the accused had not attained the age of sixteen.

"At the date of the trial the accused was more than sixteen years of age. *Held* (1), that the accused was not a young person in the sense of the Children Act, 1908, and that he might competently be sentenced to penal servitude; but (2) that the accused might be sentenced by the High Court of Justiciary to be detained in a Borstal institution."

That case was decided on a section precisely similar to that we are now dealing with.

We are very grateful to Mr. M'Cann for his industry in furnishing us with this issue of "The Scottish Law Reporter," which has been very useful to us.

On the whole case we have come to the clear conclusion that sect. 103 is not applicable, and that the prisoner must be sentenced to death in accordance with sect. 2 of the Offences against the Person Act, 1861.

The formal order of the Court will be:—

It is by the Court here considered, adjudged, and finally determined that the defendant must legally be sentenced to death in accordance with the provisions of the 24 & 25 Vict. c. 100 (Offences against the Person Act, 1861), sect. 2; and it is ordered by the Court here that the Court of Oyer and Terminer (sitting under Commission of Assize) for the County of the City of Belfast, at the adjourned sitting thereof on Saturday, the 2nd day of November, 1918, do proceed to pass sentence of death on the said defendant, Joseph Charles Fitt, in due form of law.

Solicitor for the prisoner: *John Graham.*

Solicitor for the Crown: *John R. Moorhead* (*Crown Solicitor for Antrim and City of Belfast*).

H. J. M'C.

(1) 55 Scottish Law Reporter, 10.

THE KING *v.* MANUEL ISRAELOVITCH (1).

K. B. Div.
1918.
Oct. 28.

Criminal law—Military Service Acts, 1916–17—*Absentee without leave—Bail pending remand in custody—Jurisdiction of King's Bench Division.*

A magistrate made an order under the Military Service Acts, 1916–17, remanding in custody a person accused of being an absentee without leave from the Army Reserve, in order that the prosecution might make further inquiries. On an application to admit the accused to bail:

Held, that the King's Bench Division of the High Court has jurisdiction, in a proper case, to admit an accused remanded in custody to bail; but the Court will be slow to overrule a magistrate who in his discretion has decided not to accept bail pending a remand.

MOTION to admit to bail pending the adjournment of the hearing of a charge in respect of which Manuel Israelovitch was remanded in custody. The accused was charged with having on the 23rd October, 1918, at Bridewell, in the County of the City of Dublin, been an absentee without leave from the Army Reserve, he being a person deemed by the Military Service Acts, 1916–17, to have been duly enlisted, and forthwith transferred to the Army Reserve.

The only evidence before the magistrate was that of Police Constable John J. Haugh, 130 C, whose deposition was as follows:—"Between 11 and 12 a.m., 16th instant, I went to the Irish Toy Co., 397 North Circular Road, where I saw defendant. I told him who I was. He gave his name, said he was born in London twenty-four years ago, and resided at 27 Dank Street, Hanbury Street, E., with Mr. Peskin; that he came to Ireland about six years ago—to Belfast—and resided at 5 Pacific Avenue for about three years, with Mr. Brodie, and during his time there, worked for him, as a commercial traveller; and came to Dublin, about 1915, and went to his present address, 23 St. Kevin's Road. During his time here, he was, and is, manager of the Irish Toy Company: first, at 80 Charlemont Street, for three or six months; then at 18A Synge Street, between six and nine months; then at

(1) Before MOLONY C.J., GIBSON and MADDEN JJ.

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162 North King Street, for a year; and is at the North Circular Road since February last. His parents, he said, are in Africa. He did not register under the National Registration Act, and has no certificate of exemption. He said he was in Manchester on business, three or four months ago, for a week, and stayed at Dean's Gate Hotel.

"I met defendant in Police Court yard to-day, between 11 and 12 a.m., as a result of inquiry in Belfast. I told him I had had inquiry made at 5 Pacific Avenue, and that he was not known there. He then said 5 was a mistake—that 7 was the number."

By Mr. Lidwell.—"He told me the name of the man he stayed with in Belfast was Mr. Brodie. I see the identity book produced of a Mr. Brodie. His residence is shown at 7 Pacific Avenue. He told me there were 200 girls working there."

The following affidavits were filed on the hearing of the Motion:—

Marks Schnadovitch deposed:

"1. I am clerical foreman in the Irish Toy Company Factory carrying on business at 397 North Circular Road. The business was founded by a Mr. J. Peskin, of 27 Dank Street, London, in the year 1915, and was, in the beginning, carried on at No. 80 Charlemont Street, in the City of Dublin; afterwards at No. 18A Synge Street, when I entered the employment of the Toy Company as foreman, and have continued since to be in that position.

"2. I have known Manuel Israelovitch for the past three years, since he came from Belfast to Dublin. He is the manager of the Irish Toy Company, resident in Ireland, and is the responsible person in Dublin, who undertakes and directs the business, and all orders or directions as to the work carried on are given by him. He is skilled in the making and designing of dolls, toys, and accessories, and it is quite impossible to carry on the business without his direction and supervision.

"3. When I joined the employment of the Toy Company they had about twelve girls working under the supervision of Manuel Israelovitch; since then he has developed and managed the business to such an extent that, in the year 1917, the business

was transferred to larger premises in North King Street. There the business still continued to develop until it became necessary to acquire larger premises, and towards the end of 1917 the company acquired the premises 397A North Circular Road, formerly known as the Penitentiary, and the entire business was transferred there in the month of February, 1918. There are at present employed and working at the manufacture of toys, dolls, and accessories over 200 Dublin girls, earning from 10s. to £2 10s. per week, being paid by piece-work. These girls are under the charge of a matron as well as a forewoman. I say that it is impossible to carry on the work of the factory in the absence of the said Manuel Israelovitch, or unless some arrangements are made by him as to the carrying on of the industry, as, at the present time, it is necessary to deal with large Christmas and New Year's orders, and contracts for the supply of toys to wholesale traders, and the purchase of raw material for manufacture, and the entering into engagements for the ensuing year. All these matters have been and are in the knowledge and control of the said Manuel Israelovitch alone, and there is now no person connected with the business who is familiar with the business."

Abraham Danker deposed:

"1. I am tenant of the house No. 23 St. Kevin's Road aforesaid for nearly six years, and have resided, and am at present residing, therein, with my wife and family.

"2. I have known Manuel Israelovitch for nearly four years. He came to Dublin from Belfast in the year 1915, and he at once came to live with me as a lodger, and since February in the year 1915 he resided continuously at my house up till his arrest."

"3. I know that he is connected with the Irish Toy Company as resident manager of the factory carried on by the company at No. 397 North Circular Road, Dublin."

Nathan Brodie deposed:

"1. I have known Manuel Israelovitch for the past six years. I formerly resided at No. 7 Pacific Avenue, Belfast, and the said Manuel Israelovitch came to Belfast from London early in the year 1912, and entered my employment as a traveller and canvasser for my business of picture-dealer and framer, and continued in my employment for three years, up till the month of January,

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1915, when the said Manuel Israelovitch left my employment, and went from Belfast to Dublin. During the three years he was in my employment in Belfast he resided with me in my house, No. 7 Pacific Avenue, aforesaid. I have seen the depositions made by Police Constable John J. Haugh, 130 C, on the 23rd October, 1918, in which it appears the said Manuel Israelovitch stated to the deponent that he (Manuel Israelovitch) resided at No. 5 Pacific Avenue, Belfast. In that he was mistaken, as the house he resided in was No. 7, and not No. 5, Pacific Avenue."

Lardner, for the accused :—

There was no reason here why the accused should have been remanded in custody.

Gibson J.—Has not the magistrate a discretion?

Lardner.—He has a discretion, but I say it was on the facts before him unreasonably exercised.

Molony C.J.—This was really only a remand for enquiries.

Lardner.—It is conceivable that the magistrate may improperly exercise his discretion. By statute, and at common law, this man is entitled to ask to be admitted to bail. It is unreasonable that a man in his position of life should be remanded from week to week until the magistrate makes up his mind.

Molony C.J.—This is the first remand.

Lardner.—It is conceivable he may be again remanded at the end of the week. This application arises out of a statute which affects all classes of citizens between certain ages. If the Court admits it has jurisdiction, this is an eminently proper case to exercise it. [Refers to judgment of Lord Russell of Killowen C.J., in *The Queen* v. *Spilsbury* (1), and to *R.* v. *Bennett* (2), and *R.* v. *Atkins* (3); and also, to judgment of Coleridge C.J., in *R.* v. *Manning* (4).]

Cooper, for the prosecution, was not called upon.

(1) [1892] 2 Q. B. 619.
(2) [1870] 49 L. T. 387.
(3) [1870] 49 L. T. 421.
(4) 5 T. L. R. 139.

MOLONY C.J. :—

In this case, Manuel Israelovitch was brought before the magistrate on the 23rd August, 1918, charged with being an absentee under the Military Service Acts. The only witness examined was Constable John J. Haugh, 130 C, and after hearing his evidence, the magistrate remanded the accused for a week. An application is now made to us to admit the accused to bail.

Under the Petty Sessions Act, 1851, a magistrate has power to adjourn a case, and to admit the accused to bail, or to remand him in custody for a period not exceeding eight days; and by sect. 19 of the Criminal Justice Administration Act, 1914, there is the further power given to magistrates where a person is remanded on bail, to order that the recognizance may be conditioned for his appearance at every time and place to which during the course of the proceedings the hearing may be from time to time adjourned.

The question we have to consider is, whether any case has been made out for bail. It is clear from the cases of *The Queen* v. *Spilsbury* (1) and *The Queen* v. *Manning* (2) that the Court has jurisdiction to admit to bail in a proper case; but the Court should be very slow to overrule the magistrate where, in his discretion, he has decided not to accept bail pending the remand.

The Court may do so where they are satisfied that the discretion was wrongly exercised, and on wrong grounds; but in this case, where there has been only one remand, and where undoubtedly there was some evidence before the magistrate that a wrong address had been given, we see no reason whatever to interfere with the discretion of the magistrate. Consequently, we make no rule on the motion.

GIBSON and MADDEN JJ. concurred.

Solicitor for the prosecution: *The Chief Crown Solicitor.*
Solicitor for the accused: *George Lidwell.*

H. J. M'C.

(1) [1898] 2 Q. B. 615. (2) 5 T.L.R. 159.

K. B. Div. 1918. Nov. 25.

WILLIAM BUCHANAN, COMPLAINANT; JOHN OSBORNE, DEFENDANT.

Corn Production Act, 1917 (7 & 8 *Geo.* 5, *c.* 46)—*Minimum wages*—*Workman Prosecutor*—*Proper complainant*—*Sects.* 4 (1), (2), 7, 17.

A workman employed in agriculture, being paid a less rate of wages than that fixed by the Corn Production Act, 1917 (7 & 8 Geo. 5, c. 46), sect. 4, issued a summons against his employer for arrears, and the justices dismissed the same without prejudice, on the ground that the workman should under sect. 7 have complained to the Agricultural Wages Board, by whom the proceedings under the Act should have been brought.

Held, reversing the justices, that the workman was a proper complainant.

CASE STATED for the opinion of the Court at the instance of the complainant, pursuant to the Summary Jurisdiction (Ireland) Act, 1857 (20 & 21 Vict. c. 43), as follows:—

At a Petty Sessions, holden in and for the Petty Sessions district of Newtowncunningham, county of Donegal, on Friday, the 13th day of September, 1918, one John Osborne was charged in and by a certain complaint or summons for "that he did, contrary to sect. 4 of the Corn Production Act, 1917, pay a rate of wages less than the minimum rate fixed by the Agricultural Wages Board, and for £5 8*s.* 4*d.* due complainant by defendant for arrears of wages under sect. 4 of the Corn Production Act, 1917 (1), and due by settled account"; and the said charge was duly heard and dismissed without prejudice.

(1) 4 (1). Any person who employs a workman in agriculture shall pay wages to the workman at a rate not less than the minimum rate as fixed under this Act and applicable to the case, and if he fails to do so, shall be liable on summary conviction in respect of each offence to a fine not exceeding twenty pounds, and to a fine not exceeding one pound for each day on which the offence is continued after conviction therefor:

Provided that such a person shall not be liable to be so convicted if he proves that he did not know, and could not with reasonable diligence have ascertained that the wages were less than the wages required under this Act to be paid.

(2). In any proceedings against an employer under this section the Court may, whether there is a conviction or not, order the employer to pay, in

At the hearing of the said complaint the justices held that under the Corn Production Act, 1917, any workman employed in agriculture, and being paid a less rate of wages than fixed by said Act, should, as prescribed by sect. 7 of that Act, complain to the Agricultural Wages Board, and interpreted that section and also sect. 17 of schedule 1 to the Act to mean that the proceedings under the Act were to be enforced by the Agricultural Wages Board, and consequently that the summons was improperly brought, and dismissed same without prejudice.

The judgment of the Court was required as to whether the said justices were correct in point of law in their determination.

Maguire (*Henry K.C.* with him), for complainant :—

Sect. 4, sub-s. 1, provides for payment of minimum wage, and fixes a penalty. That such wage should be paid is a public concern. There is a well-defined general rule that any member of the public has a right to prosecute in cases where the public has an interest: *Queen* v. *Stewart* (1); *Kenneally* v. *O'Keeffe* (2). Sect. 4, sub-s. 2, contemplates that the workman should go before the Court. His common-law right is not taken away by the Act.

Wylie K.C. and *Chadwick*, for the defendant :—

This is a highly penal proceeding, and the statute clearly contemplates that it should be brought by the Agricultural Wages Board and not by the workman. Under sect. 7 the workman may complain to the Board, and the Board may, if they think fit, take proceedings on behalf of the workman. This is to prevent an employer being harassed by claims for penalties in trivial cases.

addition to the fine, if any, such sum as appears to the Court to be due to the workman employed on account of wages, the wages being calculated at the minimum rate; but the power to order the payment of wages under this provision shall not be in derogation of any right of the workman to recover wages by any other proceedings.

7. Any workman employed in agriculture, or any person authorized by a workman so employed, may complain to the Agricultural Wages Board that the wages paid to the workman by any employer are at a rate less than the minimum rate applicable in the case of that workman, and the Board shall consider the matter, and may, if they think fit, take any proceedings under this Act on behalf of the workman.

(1) [1896] 1 Q. B. 303. (2) [1901] 2 I. R. 39.

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Sect. 4, sub-s. 2, indicates clearly that the proceedings are to be taken by the Board, the ordinary right of the workman to sue for his wages as distinct from penalties being left untouched. The duties under the Act are throughout cast either upon the Board of Agriculture (in Ireland the Department of Agriculture), or, under Part II of the Act, upon the Agricultural Wages Board. If these proceedings are not to be taken by the Board, clause 17 (1) of the first schedule to the Act has nothing to operate upon. There is no hardship on the workman, as his ordinary remedies are preserved, and one-half of the members of the Agricultural Wages Board must represent workmen under clause 11 (1) of the first schedule. The statute itself limits the general rights of the public to take proceedings within the judgment of Palles C.B. in *Kenneally* v. *O'Keeffe* (1); see also *Queen* v. *Hicks* (2).

Maguire, in reply.

MOLONY C.J.:—

In this case William Buchanan issued a summons at Petty Sessions against John Osborne, complaining "that he did, contrary to sect. 4 of the Corn Production Act, 1917, pay a rate of wages less than the minimum rate fixed by the Agricultural Wages Board, and for £5 8*s.* 4*d.* due complainant by defendant for arrears of wages under sect. 4 of the Corn Production Act, 1917, and due by settled account." At the hearing before the justices the merits apparently were not gone into; but the justices held that "any workman employed in agriculture, and being paid a less rate of wages than fixed by the said Act, should, as prescribed by sect. 7 of that Act, complain to the Agricultural Wages Board"; and they interpreted that section "and also sect. 17 of schedule 1 to the Act to mean that the proceedings under the Act were to be enforced by the Agricultural Wages Board, and consequently" they held that the summons was improperly brought. The question we have to consider is as to whether there was a proper complainant before the justices. That depends on the nature of the penalty given by the Corn Production Act. The Act is, as its title states, "for encouraging the production of corn, and for purposes

(1) [1901] 2 I. R. 39. (2) 4 E. & B. 633.

connected therewith (including provision as to agricultural wages and rents)"; and the object of the Act is carried out by giving the farmer a minimum price for wheat and oats, and giving the worker a minimum wage. Sect. 4 provides [His Lordship quoted sect. 4, sub-s. 1]. And there is then a proviso [His Lordship quoted sub-sect. 2]. Let us see what is the general rule as to who can be a complainant in an offence created by statute. The rule in England is stated in *The Queen* v. *Stewart* (1). Kay L.J. there lays it down at p. 303:—"Prima facie, there is no doubt that anybody may take proceedings to recover a penalty. That is an old rule and well established. The Act now under consideration in terms provides that penalties shall be imposed for certain acts, and that those penalties shall be regarded as though they were penalties incurred under the Summary Jurisdiction Acts. In order to prevent the application of the general rule, it must be shown that the Act in plain terms prevents anyone except certain specified persons from prosecuting for offences under the Act." A rule to the same effect was laid down by Chief Baron Palles in *Kenneally* v. *O'Keeffe* (2), where he says:—"In the absence of decisions or practice to the contrary, it would be reasonable to infer from these premises that when justices acquired a jurisdiction to dispose summarily of particular new offences created by statute, prima facie any member of the public might lay an information in respect thereof. This prima facie inference might necessarily be rebutted in either of two ways:—First, by that which was constituted an offence instead of being matter which affected the public generally, being no more than a grievance to a particular person. In such a matter the public as such has no concern. Secondly, by the statute creating the offence, negativing or limiting the general right; but if the offence was one against the public generally, then the mere circumstance that a member of the public had no pecuniary interest in a conviction would appear to be insufficient to rebut the inference, because it was not upon any such pecuniary interest that his prima facie right to proceed depended." In *Clarke* v. *Maguire* (3) Chief Baron Palles applied the same principle, and held there that "on the true construction

(1) [1896] 1 Q. B. 303. (2) [1901] 2 I. R. 39. (3) [1909] 2 I. R. 681.

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of the 40th section of the Medical Act, 1858 (21 & 22 Vict. c. 90), it appeared that its object was not to benefit medical practitioners or any class of them or to prevent unqualified persons from practising, but to benefit the public by preventing persons having no medical qualifications from representing themselves as qualified, and thereby committing fraud upon the public."

Mr. Wylie has sought to bring this case within the exception relating to an individual or to a limited class, and argued that the general prima facie rule is excluded. Mr. Wylie referred to *The Queen* v. *Hicks* (1). It is an illustration of the exception, for there Campbell C.J. (at p. 646) says:—"This enactment is not for the benefit of inhabitants of Torquay nor of licensed hawkers, but merely for the benefit of the company that they may be reimbursed the expense they have incurred in purchasing the new market-place and erecting sheds, stalls, stations, and other conveniences thereon."

The defendant relies on sect. 7. On the true reading it is against Mr. Wylie's contention. The workman may not be in a position to take proceedings. The object of the section is to enable him to complain to the Agricultural Wages Board, who may if they think fit take proceedings on behalf of the workman. Sect. 14 enables the Board to appoint "such officers as they think necessary for the purpose of investigating complaints and otherwise securing the observance of Part II of this Act." This is simply ancillary to sect. 7, and provides the machinery by which the objects of sect. 7 are to be carried out, but in no way limits sect. 7 or prevents any member of the public from suing for the benefits under the Act. I hold that the magistrates were wrong in dismissing the summons, and that the complainant was entitled to prosecute.

KENNY J.: I concur.

Solicitor for the complainant: *T. E. Conaghan.*
Solicitor for the defendant: *Stuart C. Ross.*

H. H.

(1) 4 E. & B. 633.

SPICER *v.* MURNANE (1).

War—Emergency legislation—Defence of the Realm Regulation, 2 *F.—Flour and Bread (Prices) Order*, 1917 (5 *b*)—*Maximum price of bread—Reasonable additional charge for making delivery—Delivery—Bread sold from a travelling van.*

K. B. Div. 1918. May. 7.

Under the Flour and Bread Prices Order, 1917, 5 (*b*), an additional charge for delivery may be made in the case of bread sold (not in pursuance of any previous contract) from a van that comes at the express or implied request of a customer residing in the country at a distance from the bakery and other bakers' shops.

Wallace v. *Burrows*, [1918] 2 I. R. 127, considered and distinguished.

CASE STATED by the justices at Ballivor, Co. Meath, Petty Sessions.

The nature of the facts and arguments sufficiently appears from the judgment of Gibson J.

M. Cooper and *Serjeant Matheson*, for the complainant.

J. Dixon and *T. M. Healy K.C.*, for the defendant.

GIBSON J. :—

This case is of great practical importance, as it affects ordinary course of trade in relation to the every-day habits of life of the community. It is obviously desirable that food regulations should be applied with some approach to uniformity in the various parts of the United Kingdom, and also that such regulations, loosely drafted as they are, should be interpreted, where reasonably possible, in such a way as not to upset or destroy settled business arrangements to the prejudice of the public as well as of respectable traders. The sales founding the prosecution were made by a Trim baking company to various regular customers living in the country, many miles away, who were supplied with bread from the firm's bread-van, for which they paid on delivery. As is usual, there was no previous contract for sale of any particular number of loaves; there was no legal obligation on the part of the baker to sell or on the part of the customer to buy; the quantity sent

(1) Before GIBSON and KENNY JJ.

K. B. Div. 1918.

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Gibson J.

out by the van was regulated by the estimated requirements of customers in the district, with probably a small surplus to meet unexpected calls. There was no legal sale till the loaves were actually delivered by the vanman. The resident magistrate held that no additional charge could be made for delivery, and that *Wallace* v. *Burrows* (1) so decided. An objection was made to the summons as not specifying the particular sales constituting the alleged offences. The objection, which was overruled, was well founded; but I confine my judgment to the construction of the Flour and Bread (Prices) Order, 1917, clause 5 (*b*), and to the effect of *Wallace* v. *Burrows* (1).

Serjeant Matheson contended that no additional charge was authorized save for delivery in pursuance of an actual previous contract of sale, and that other cases involving possible inconvenience or hardship must be dealt with by licence. We cannot accept his argument, which would make the additional charge for delivery practically inoperative. Customers take what they want from day to day without any antecedent bargain. A delivery to a distant customer in accordance with a course of dealing would seem to warrant the additional charge. Having made inquiries as to the effect given to the order in England, we find that in circular No. 43, 2nd November, 1917, the Ministry of Food state their opinion that no objection should be raised by food control committees to a reasonable additional charge being made for bread sold from a van, provided that such sale is made at such a distance from the seller's place of business as rendered it reasonable that such charge should be made. We think that the order may fairly be so construed. The circular may not apply to Ireland but uniformity of administration is clearly desirable. If a reasonable addition may be made for delivery, no licence is required. A special licence is contemplated in relation to exceptional circumstances, but the bread delivery here described is of the normal type.

Wallace v. *Burrows* (1) does not govern the present facts. There the sale was to a casual purchaser in a town where shopkeepers apparently were selling bread at the standard price, and the van was taken to be a travelling shop. The case does not apply to

(1) [1918] 2 I.R. 127.

distant country customers, taking their regular supply from a bakery whose van comes at their express or implied request. Whether that case could be extended to a new distant customer, buying for the first time without tacit request, or to one in a country neighbourhood, occasionally using the facility of the van's passing to supply his casual needs, is a matter not now requiring decision. The English circular above referred to does not appear to draw any distinction between sales from van. How the Belfast firm in *Wallace* v. *Burrows* (1) succeeded in selling bread at a higher price than local Newtownards traders were charging (as assumed by the Court) does not appear, unless the explanation be that Newtownards customers liked their Belfast bread so much that they were willing to pay extra. The gist of the case was that the sale was from an ambulatory shop to a chance buyer.

No question was raised below as to the reasonableness of the additional charge. The decision below was erroneous.

KENNY J. concurred.

Solicitor for the complainant: *The Chief Crown Solicitor.*
Solicitor for the defendant: *T. Noonan.*

A. E. C.

(1) [1918] 2 I. R. 127.

K. B. Div. (*Revenue.*) 1918.

June 19.

F. W. CORCORAN, Appellant; J. W. JUDGE, Respondent (1).

Revenue—Income tax—Land Purchase Acts—"Annuity payable"—Reduction of purchase annuity—Finance (No. 2) Act, 1915 (*5 & 6 Geo. 5, c. 89*), *sect.* 22 (2) (*c*).

"Annuity" and "Land Purchase Acts" have the same meaning in section 22, sub-sect. (2) (*c*) of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), as in the Land Purchase Acts.

Even though an annuity has been reduced under section 24 of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33), or under section 25 of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), the reduced amount is the "annuity" for the purposes of the above sub-section, and will be taken as the basis for the calculation of income tax thereunder.

"Annuity payable" under section 22, sub-sect. (2) cannot be read to mean "annuity originally fixed."

Case Stated, under the Taxes Management Act, 1880, sect. 59, by the Commissioners for the Special Purposes of the Income Tax Acts.

The case stated as follows:—

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on the 7th December, 1917, at Claremorris, for the purpose of hearing appeals, Mr. J. W. Judge, hereinafter called the respondent, appealed against an assessment to income tax in the sum of £39 5*s.* for the year ending 5th April, 1918, made upon him under Schedule B of the Income Tax Acts in respect of lands occupied by him at Claremorris.

2. The following are the facts of the case:—

(*a*) The lands in respect of which the assessment was made were purchased by the tenant occupying them in 1875, under the provisions of the Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46).

(*b*) One-third of the purchase-money was provided by the purchaser, the other two-thirds being advanced by the Commissioners of Public Works, Dublin (hereinafter referred to as "The Board of Works"), under the provisions of sects. 44 and 45 of the said Act. (The deed of purchase, which was a grant for ever in

(1) Before Gibson and Madden JJ.

the usual form of a Landed Estates Court conveyance, subject to and charged with an annuity of £41 2*s.* in favour of the Commissioners of Public Works for the term of thirty-five years, was annexed to the case.)

(*c*) In consideration of the advance made by the Board of Works, the lands were charged with an annuity of £41 2*s.* in favour of the Board, payable for thirty-five years. The annuity was subsequently reduced to £32 17*s.* 8*d.*, and the term extended under sect. 24 of the Land Law (Ireland) Act, 1887, and a further reduction of the annuity has since been made by virtue of the provisions of sect. 25 of the Land Law (Ireland) Act, 1896. The annuity now stands at £17 19*s.* 8*d.*, the poor law valuation of the lands being £39 5*s.*

(*d*) The Surveyor of Taxes had based the assessment on the poor law valuation, which is less than the original annuity.

3. The respondent contended that the annuity of £17 19*s.* 8*d.* was a purchase annuity, and that the assessment should be based on that amount and not on the poor law valuation. He relied on sect. 22 (2) (*c*) of the Finance (No. 2) Act, 1915.

4. It was contended, on behalf of the Crown—

(*a*) That the annuity was not a "purchase annuity payable under the Land Purchase (Ireland) Acts" within the meaning of sect. 22 (2) (*c*) of the Finance (No. 2) Act, 1915, and that the Acts under which the advance was made and the annuity charged are not Acts for the purchase of land.

(*b*) That the assessment had been correctly based on the poor law valuation.

5. Having considered the whole of the facts and contentions as herein set out, we were of opinion that the amount payable to the Board of Works constitutes a purchase annuity under the Land Purchase Acts. We were further of opinion that as the annuity represents two-thirds only of the value of the land, it was somewhat doubtful whether it falls within sect. 22 (2) (*c*) of the Finance (No. 2) Act, 1915. We, however, thought it right to give the benefit of such doubt to the respondent, and we accordingly reduced the assessment to £17 19*s.* 8*d.*

6. The appellant immediately upon the determination of the appeal declared to us his dissatisfaction therewith as being

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erroneous in point of law, and in due course required us to state a case for the opinion of the High Court pursuant to the Taxes Management Act, 1880, sect. 59, which case we have stated and do sign accordingly.

The questions for the decision of the Court are :—

1. Whether the annual amount payable to the Board of Works under the provisions of the Landlord and Tenant (Ireland) Act, 1870, is a " purchase annuity " within the meaning of sect. 22 (2)(*c*) of the Finance (No. 2) Act, 1915, or not.

2. Whether the assessment in this case should be made upon— (*a*) the poor law valuation ; (*b*) the original annual sum of £41 2*s.*; or (*c*) the reduced annual sum of £17 19*s.* 8*d.*

G. Shannon and *S. L. Brown K.C.*, for the appellant :—

From the frame of this section it is clearly only intended to apply to annuities payable under the Land Act of 1903. It contemplates and provides for three periods—rent, interest in lieu of rent, and purchase annuity. " Annuity payable " must mean annuity originally payable. Otherwise a tenant purchaser who redeemed his whole annuity except £1 per annum would only have to pay income tax on £1, while if he redeemed the whole of his annuity he would have to pay on the poor law valuation of the land. This would be an absurd result, and open a channel for the evasion of the provisions of the Act.

W. H. Carson, for the respondent :—

This is clearly a purchase annuity : sections 44 and 45 of the Land Act of 1870 ; Land Act of 1881, sect. 24 (since repealed) ; Land Act of 1885, sect. 4 ; Land Act of 1887, sect. 24 ; Land Act of 1891, sect. 42 ; Land Act of 1896, sect. 25 (1), sect. 25 (5), sect. 48. Sect. 26 (5) applies the definition of " purchase annuity " to the former Acts. " Purchase annuity " has clearly the same meaning as in the Land Purchase Acts, and the Act should be construed as one with them. Sect. 95 of the Local Registration of Title (Ireland) Act, 1891, gives a definition of the Land Purchase Acts. The fact that the annuity has been reduced in amount does not prevent its being " the annuity." There is no absurdity in this construction. Even under the Land Act of 1903 an annuity might become similarly reduced in amount.

GIBSON J. :—

The point for decision in this case is the effect of sect. 22, sub-s. 2 (*c*), of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89). At the time of the legislation, income tax, under schedule B, was, in general, to be assessed in reference to annual value, but in Ireland the annual value was to be taken, not on the basis of the annual value proper, but as determined by one of three scales or standards, resulting in most cases in a value less than the value ascertained by the valuation code. These standards might differ in money results. Judicial rent might be varied and reduced every fifteen years, and Mr. Brown admits that "the judicial rent fixed under the Land Law (Ireland) Acts or any of them" in sub-clause (*a*) must mean rent fixed for the time being, notwithstanding the use of the word "fixed." The Legislature should have been aware that the judicial rent might vary with a tendency to reduction. The second sub-clause (*b*) deals with "interest payable to the Irish Land Commission in lieu of rent." This interest was contractual, and would vary in amount. Under sect. 18 of the Statute of 1903, c. 37, 3½ per cent. was payable.

"Payable" in sub-sect. 2 (*b*) must mean payable for the time being, like the judicial rent. Such interest, however, would be fixed at the time of contract, and would not usually be reducible in rate. Next comes sub-clause (*c*). Unlike the rent in clause (*a*) and interest in lieu of rent in clause (*b*) which represent the value of the purchased hereditament all through, the purchase annuity, when reduced by lapse of time, only represents the unbought portion of the hereditament originally purchased by the full purchase annuity. The same word "payable" is used in the clause, and the draughtsman may have thought that "purchase annuity" provided a durable fixed measure of value. Mr. Brown admits that the purchase annuity in the present case was a "purchase annuity" under the Land Purchase Acts, and that no distinction can be drawn between the Act of 1870, c. 46, and the other Acts as to purchase annuities. His whole contention is that "payable" here means "payable when the original purchase took place." Does it mean "payable" at the date of creation or

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payable when income tax falls to be assessed? Mr. Brown says we are bound to give a meaning to the legislation which will not produce a preposterous result, and he points out with unanswerable force that not only is a purchase annuity automatically reduced as time goes on, but that such reduction may be accelerated by partial redemption, so that while any part of such annuity remains payable, however trifling in amount, the tenant would, on the literal construction of clause (*c*), only be assessable on the reduced or unredeemed portion of the annuity, though when the annuity had altogether disappeared, he would become chargeable on the annual value of the land purchased. The case for the Revenue might possibly (though this would be difficult to argue) be stronger if the tenant had partially redeemed the annuity. The reduction would then have been the consequence of a voluntary act on his part; but here we have to deal with an annuity automatically diminishing. The word "payable" appears to describe the annuity as it stood at the date when the tax was imposed and the assessment made. Clause (*a*) contemplates a reducible rent. It seems impossible to construe clause (*c*) as meaning the annuity payable formerly but no longer payable. A tenant buying from the original purchaser would look to the annuity at that time charged without inquiry as to the annuity in its original amount. The clause in its present shape is doubtless the result of oversight, Parliament not having had present to its mind that a purchase annuity was not a fixed sum, but was diminishing from time to time. If the words allowed a construction which would avoid glaring absurdity from the actual effect of the language employed, the Court would adopt it, but the literal interpretation appears to us the only possible one. The enactment cannot be read, without re-writing it, as meaning the annuity payable as originally fixed. It refers to annuity not in the past but when the tax comes to operate in the present. The remedy for the oversight must be supplied by legislation. Mr. Carson suggests that the object may have been to encourage and reward the thrifty Irish tenant. The holder actually assessed might have himself bought from the original purchaser, and such holder might know nothing about the original annuity. I think, however, that the provision, as we now interpret it, does not represent any considered intention to

give such unintelligible boon. It is so absurd that it must be based on mistake as to the nature of a purchase annuity, which was erroneously supposed to be fixed for the period of its currency. The commissioners' view of the construction of clause (*c*) was correct.

We must affirm their decision, with costs to the respondent.

MADDEN J.:—

Mr. Brown had an easy task in showing the anomaly, inequality, and injustice which will result from reading sect. 22 (2) (*c*) of the Finance (No. 2) Act, 1915, in what he admits to be its literal meaning. The most obvious is that under the sliding scale in the Act of 1896, the purchase annuity originally fixed gradually diminishes and will ultimately disappear, while at each stage of this process it is to be taken as the basis of taxation. Again, the purchase annuity never represented the value of the holding, where a portion of the price was advanced by the purchasing tenant. In sales under the Act of 1870, like the present case, the State advanced only two-thirds of the price, and in many cases under the recent statutes, the tenant advanced a substantial portion of the purchase-money.

It was not so easy for Mr. Brown to suggest an interpretation other than the literal one which could be reasonably applied to the section. His only suggestion was that the words "annuity originally fixed" should be substituted for "annuity payable." But such a construction presents insuperable difficulties. In the first place the annuity originally fixed is not payable. It would be a violation of the English language to describe it as now payable. In the next place, as my brother Gibson has pointed out, the amount of the annuity may have been estimated twenty or thirty years ago, and there may have been a devolution of title since then. That is another and a fatal objection. The framer of the sub-section started with two measures of value which looked like fair tests of value—(*a*) the judicial rent fixed, and (*b*) interest on the purchase-money payable in lieu of rent. It then went on to the "purchase annuity." The purchase annuity originally fixed, if the whole purchase-money had been advanced by the

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Madden J.

State, might have been taken as a basis of taxation, and the sub-section was evidently framed on the assumption that this was so, and that the purchase annuity remained unaltered since the date of the purchase. I see no way of departing from the letter of the Act which would avoid the consequences suggested by Mr. Brown.

Solicitor for the appellant: *Richard Martin.*
Solicitor for the respondent: *Conor A. Maguire.*

A. E. C.

K. B. Div. 1918.

June 4.

COMMISSIONERS OF INLAND REVENUE, APPELLANTS, *v.* AULD, PEMBERTON & Co., LIMITED, RESPONDENTS (1).

Revenue—Excess profits—"Special circumstances"—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), schedule 4, part 1, clause 5—Appeal—Exclusive jurisdiction of commissioners.

The determination of special circumstances and of the allowances to be made in relation thereto under clause 5 of part 1 of schedule 4 of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), is a matter for the discretion of the Commissioners of Inland Revenue, and no appeal lies from their decision.

SPECIAL CASE STATED.

The following are the material portions of the case as stated by his Honor the Recorder of Belfast:—

"Two questions were raised on behalf of the appellants (Messrs. Auld & Pemberton, Ltd.), but as I decided one of these in favour of the commissioners, it is only necessary to deal with the other, viz., whether there were any 'special circumstances' within the meaning of section 5, part 1, of the fourth schedule to the Finance (No. 2) Act, 1915, which justified me in allowing or enabled me to allow for the remuneration of directors sums in excess of the 'sums allowed for those purposes in the last pre-war trade year.'

(1) Before GIBSON, MADDEN, and KENNY JJ.

"The facts are as follows:—

"The company is practically a private company, and Mr. Auld and Mr. Pemberton are practically the company. Prior to the formation of the company both these gentlemen were employed by Mitchell & Co., tobacco merchants, of Dublin, at yearly salaries of, in Auld's case, £150 and £50 bonus, in Pemberton's case of £110 and dinner free, the value of the latter being taken at the hearing before me at £15 yearly. When Auld and Pemberton started business on their own account it was agreed that Auld should receive a yearly salary of £100 and Pemberton £76. They relied upon their share of the profits of the company to make up their means of livelihood, and I inferred and found that the salaries last mentioned were fixed as a matter of convenience and a mode of distribution of profits, and not at all as the actual and proper remuneration for their services. Men whose yearly salaries from their former employers amounted, as stated above, to £200 and £125 respectively, could not be considered adequately remunerated by £100 and £76 a year in respect of their services to the company. It appeared to me and I found that there were 'special circumstances' in the case, and that the real and fair remuneration to be allowed the directors as directors was at least equal to, if it did not exceed, what they had earned as employees, and I fixed that at £325.

"A case of *The King* v. *Francis Fenwick & Co., Ltd.* was quoted to me by the income tax official as a conclusive authority upon the question; but after he had kindly lent me his (private) printed report, and I read it, I could not find that it had any bearing on the point.

"The written note of the decision of the Special Commissioners on the hearing before them was shown to me, and was as follows: 'Mr. Thomas (an accountant from Hodge & Smith) and Mr. Auld, director, attended. Claims additional remuneration for the directors in the accounting period. We informed them we had no jurisdiction, there being no other point in question. Determination of the Commissioners—Assessment confirmed.'

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"I am unable to understand the view of the Commissioners, that they had no jurisdiction. It was contended before me that the right to determine whether there were "special circumstances," as explained, was vested in the Special Commissioners, and that I had no jurisdiction to interfere with their decision on that point. I did not agree with this view; and I also found that these Commissioners 'had not exercised such jurisdiction, but had declined it.'"

George Shannon (with him *Serjeant Matheson*), for the appellants:—

The Commissioners have absolute discretion as to the determination of special circumstances and the allowance to be made in respect thereof. The language of paragraph 5 of Part I of the fourth schedule to the Finance (No. 2) Act, 1915, 5 & 6 Geo. 5, c. 89, is clear and unambiguous; and the decision of the English Court in *R.* v. *Commissioners of Inland Revenue* (1) supports the contention that the decision of the Commissioners as to special circumstances is final.

Herbert Thompson, for the respondents:—

The respondents misconceived their remedy in this case. The appeal did not lie to the Special Commissioners, but to the Board of Referees, under sect. 40, sub-s. 3, of the Act. If that section is not applicable, the right of appeal is given by sect. 45.

Serjeant Matheson, in reply:—

Sect. 40, sub-s. 3, applies only to particular cases unlike the present. No appeal lies where, as in paragraph 5 of part 1 of schedule 4, the language of the enactment imports a final decision.

GIBSON J.:—

The matter in controversy is as to whether, under paragraph 5, part 1, of the fourth schedule to the Finance (No. 2) Act, 1915, 5 & 6 Geo. 5, c. 89, it is left to the discretion of the commissioners to determine as regards "special circumstances." Two matters have to be determined under that provision—first, whether

(1) [1918] 1 K. B. 143.

there are "special circumstances"; and, secondly, if they exist, what allowance is to be made. The present case was an appeal from the primary tribunal, and the Special Commissioners affirmed the assessment. It appears from the written note of their decision referred to in the case, that they stated that they had no jurisdiction, but their order appears to have adopted the assessment made by the primary body.

The matter was presented to us in the argument in a two-fold aspect. Mr. Thompson argued that the whole matter was coram non judice, because an appeal properly lay, under sect. 40, sub-s. 3, of the Act, to the Board of Referees. If that contention was right, it would get rid of the entire matter, and the learned Recorder's decision would be unsustainable. We do not, however, agree that the provisions of sect. 40, sub-s. 3, apply; those provisions give jurisdiction only in respect of modifications in special circumstances which do not exist here. We consider that Mr. Thompson's argument is incorrect.

If sect. 40, sub-s. 3, is out of the case, is there any right of appeal? Mr. Thompson hardly argued that there was, his reliance being on sect. 40, sub-s. 3. Broadly speaking, it might look as if it was intended to give a right of appeal in every case where a party was aggrieved with an assessment, and that there should be an appeal, not only to the Special Commissioners, but also by cases stated. Inasmuch as a decision as to "special circumstances" relates to the determination of the pre-war standard, it might be reasonable that an appeal should lie as regards the existence of special circumstances or as to the allowance made. The matter is one of difficulty. The words of the enactment are negative. Several sections of the statute are affirmative; possibly such affirmative provisions imply negatives, but express negative words always possess special force. Under the negative words of paragraph 5, apparently the Commissioners are the body to determine the existence of special circumstances and the allowance to be made. There appears to be no authority either in England or Ireland as to the finality of the conclusions of the Commissioners. The case of *R.* v. *Commissioners of Inland Revenue* (1) does not directly settle

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COMMRS. OF INLAND REVENUE *v.* AULD, PEMBERTON, & Co.

Gibson J.

the point. It was an application for a mandamus; it, however, assists the view that the decision of the Commissioners is final; because if there was a right of appeal, remedy by mandamus would have been inapplicable. That point was not made in the case, but it would seem impossible that the Court should have entertained the application for mandamus at all had there been any question of a right of appeal. We must give effect to the argument of counsel for the Inland Revenue, and decide that the learned Recorder was incorrect in his decision, as he had no jurisdiction to review the determination of the Commissioners as to "special circumstances," that being a matter which rested with the Commissioners alone. Having regard to the difficulty of the question, on which there has been no direct authority hitherto, we will not give costs (1).

MADDEN and KENNY JJ. concurred.

Solicitor for appellants: *Richard Martin.*
Solicitor for respondents: *W. K. Gibson.*

C. N. K.

(1) See also *Williamson Film Printing Company* v. *Inland Revenue Commissioners*, [1918] 2 K. B. 720, where the same point has been decided.

SANDERS AND OTHERS *v.* CROSSLEY (1).

Appeal.
1918.
June 19, 20, 28.

Deed—Intention to defraud, defeat, or delay creditors—10 Chas. I, sess. 2, c. 3 (Ir.)—Bills of Sale (Ireland) Act, 1879 (42 & 43 Vict. c. 50)—"Possession or apparent possession."

On the 17th August, 1914, the defendant, against whom the plaintiffs had obtained a judgment for the sum of £583 5*s.* 3*d.* (being the defendant's share of the joint liability of the plaintiffs and the defendant to the Provincial Bank), made a voluntary assignment of all the furniture in his residence to his wife. In pursuance of a writ of fi. fa. under the plaintiff's judgment, the sheriff seized the furniture which up to the seizure remained in the apparent possession of the judgment debtor. It was claimed by the defendant's wife as her absolute property under the assignment. At the date of the execution of the deed, the financial circumstances of the defendant were somewhat involved, but it was contended that he was in a position at that time to make a valid voluntary assignment. The plaintiffs' case was that the defendant was not, in fact, in such a position, and that the deed was void as a bill of sale under the Bills of Sale (Ireland) Act, 1879 (42 & 43 Vict. c. 50), s. 8. The Court decided on the facts (affirming the judgment of the King's Bench Division), that the deed was fraudulent within the meaning of the 10 Chas. I, sess. 2, c. 3 (Ir.).

Held (per Ronan L.J.), that it was void as a bill of sale by virtue of sect. 8 of the Bills of Sale (Ireland) Act, 1879, the chattels comprised in the bill of sale having remained "in the possession or apparent possession of the person making such bill of sale."

APPEAL from an order of the King's Bench Division affirming the judgment of Mr. Justice Moore on the trial without a jury of an issue whether the goods and chattels seized by the sheriff on the premises of the defendant in the action were at the time of the said seizure the property of the defendant's wife.

The plaintiffs obtained a judgment against the defendant for the sum of £583 5*s.* 3*d.*, £129 8*s.* 1*d.* thereof being one-fourth of the sum of £517 12*s.* 4*d.* paid to the Provincial Bank on foot of a joint and several promissory note, dated 23rd October, 1914, of the plaintiffs and the defendant as sureties for the Tourist Development (Ireland), Ltd., for the sum of £500, payable three months

(1) Before O'CONNOR M.R., and RONAN and MOLONY L.JJ.

Appeal. 1918.

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after date, and £438 9*s.* 6*d.*, being one-fourth of the sum of £1753 18*s.*, paid by the plaintiffs to the bank on a joint and several guarantee, dated the 30th December, 1908, of the plaintiffs and the defendant, whereby the plaintiffs and the defendant guaranteed payment to the bank of all moneys due or to become due to them by the Tourist Development (Ireland), Ltd., not exceeding £5500, the balance of the judgment being made up of interest.

The plaintiffs handed the writ of fi. fa., issued on foot of the said judgment, to the sheriff of the county of Dublin for execution, and in pursuance of it the sheriff seized the furniture in the defendant's residence, Glenhedder, Avoca Avenue, Blackrock.

The goods were claimed by Mrs. Florence Angelus Crossley, the wife of the defendant, as her absolute property under a deed of assignment, dated 19th August, 1914, and the sheriff having applied for an interpleader order, an issue was directed to be tried before a judge without a jury, in which Mrs. Crossley should be plaintiff and the plaintiffs in the action should be defendants; and the question on the trial of such issue was to be whether the goods and chattels seized by the said sheriff, or any and, if so, what part thereof, were at the time of the said seizure the property of the said claimant or not.

The furniture and other chattels comprised in the assignment had belonged to the defendant. They were in the house occupied by the defendant and his wife at the date of the assignment, and were allowed to remain there up to the time of the seizure. Mrs. Crossley had no claim thereto except under the assignment, which was admittedly a bill of sale.

The issue was heard on the 16th day of November, 1917, before Mr. Justice Moore who, after hearing the witnesses, came to the conclusion that the assignment of the chattels was fraudulent and void under 10 Chas. 1, s. 2, c. 3 (Ireland). The King's Bench Division affirmed the judgment of Mr. Justice Moore, and the present appeal was brought from the order of the Divisional Court.

Serjeant Sullivan (with him *Joseph O'Connor*), for the appellant.

Conner K.C. (with him *Charles Murphy*), for the respondents :—

The deed is a mere "pocket deed." It is fraudulent within the meaning of the 10th Charles I, sess. 2, c. 3 (Ir.). It is also void as a bill of sale, the goods remaining all along in the possession, order, and disposition of the execution debtor. Moreover, the execution debtor could not make a gift to his wife at common law. He could only do so by virtue of the 10th section of the Married Women's Property Act; but then the gift would be void if the chattel remained, as it did here, in the reputed ownership of the husband after the transaction. [Authorities cited and discussed :—*In re Lane Fox* (1); *Freeman* v. *Pope* (2).]

The Court unanimously held on the facts that the deed was fraudulent within the meaning of the 10th Charles I, sess. 2, c. 3 (Ir.). The judgments did not deal with the point raised by the respondents on the 10th section of the Married Women's Property Act, and this report is confined to the point as to the validity of the deed under the Bills of Sale (Ireland) Act, 1879 (42 & 43 Vict. c. 50), on which the following judgment was delivered by

RONAN L.J. :—

In his evidence Mr. Crossley says that his "only object" (in executing the deed) "was that his wife and family would be left in possession of everything I had in his absence, that she might have absolute freedom of action for the benefit of herself and her children." He had a solicitor in the transaction; bearing that in mind it seems to me absolutely impossible—if Mr. Crossley is telling the truth—to understand why the deed was confined to the furniture. According to Mr. Crossley the furniture was worth about £400, not more than one-fourth of his property.

If he wanted to secure everything to his wife for the benefit of herself and the children, and had a solicitor acting for him, why did he not convey all to a trustee in trust for them? or, if what he apprehended was death, why did he not, as the Master of the Rolls suggests, make a short will? The fact that the deed is

(1) [1900] 2 Q. B. 500.

(2) L. R. 5 Ch. App. 538.

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Ronan L.J.

confined to the furniture is, to my mind, the most conclusive fact as to his intention.

However, there is another ground on which I wish to rest my judgment, and the Master of the Rolls has asked me to deal with this branch of the case. I am of opinion that the deed is void under the Bills of Sale Acts. I will state shortly my reasons. The question is whether this deed (admittedly a bill of sale, and the sole foundation of the claimant's alleged title to the goods) is void as against the plaintiffs under sect. 8 of the Bills of Sale (Ireland) Act, 1879 (42 & 43 Vict. c. 50).

The 15th section of the amending Act of 1883 (46 Vict. c. 7) repeals this section, but sect. 3, sub-s. 2, of the latter Act provides that the Act shall not apply to bills of sale "given otherwise than by way of security for the payment of money." It has been held in *Swift* v. *Pannell* (1) and in *Heseltine* v. *Simmons* (2), on the corresponding sections of the two English Acts, that the joint effect of sects. 3 and 15 of the Act of 1883 (46 Vict. c. 7) is that the repeal of sect. 8 of the Act of 1879 (42 & 43 Vict. c. 50) by sect. 15 of the Act of 1883 is confined to bills of sale "given by way of security for the payment of money."

Section 8 of the Act of 1879 (42 & 43 Vict. c. 50) therefore applies to the present case, and it is admitted that it avoids the deed if at the time of the execution of the process the chattels comprised in the bill of sale were "in the possession or apparent possession of the person making such bill of sale." I have stated the effect of the sections in general terms, as this branch of the case really depends entirely on the words which I have put in inverted commas above.

It will be observed that there are two distinct alternatives (*a*) in the possession of the person making such bill of sale, (*b*) in the apparent possession of that person. There is no definition of (*a*) in the Act: it is left to its ordinary meaning; but there is a very specific clause as to (*b*), viz., sect. 4, sub-s. (3), which is as follows:—"Personal chattels shall be deemed to be in the apparent possession of the person making or giving a bill of sale so long as they remain or are in or upon any house . . . occupied by him or are used and enjoyed by him in any place whatsoever,

(1) 24 Ch. D. 210.

(2) [1892] 2 Q. B. 547.

notwithstanding that formal possession thereof may have been taken by or given to any other person."

It will be seen that the words "in the apparent possession of the person making such bill of sale" in sect. 8 of 42 & 43 Vict. c. 50 are the very words of sect. 4, sub-s. 3, of the Act. Section 4, sub-s. 3, is taken from sect. 7, sub-s. 3, of the Irish Act of 1854 (17 & 18 Vict. c. 55), and sect. 8 from sect. 1 of that Act.

The corresponding English enactments are sect. 4, sub-s. 3, and sect. 8 of the Act of 1878 (41 & 42 Vict. c. 31), and sect. 7, sub-s. 3, and sect. 1 of the English Act of 1854 (17 & 18 Vict. c. 36). The latter Act is the earliest Act, and its title is "An Act to prevent frauds on creditors by secret Bills of Sale of personal chattels." Those clauses as to "apparent possession" were therefore in force in both countries from 1854 to 1878 and 1879, and were then re-enacted without any practical variation.

The question, therefore, seems to me to be simply this: Did these chattels "remain in a house occupied by" Crossley? If they did, the Act says in terms "they shall be deemed to be in his apparent possession," and if so they are within sect. 8 of 42 & 43 Vict. c. 50. Is there any possible doubt that they did so remain, or that the house was occupied by him? It was his property and his residence. His wife had no title to it, nor any interest in it. It seems to me impossible to contend that a man does not occupy his own dwelling-house because his wife lives with him. I can, however, in this case see no other ground on which it can be contended that this case is not within sect. 4, sub-s. 3, of 42 & 43 Vict. c. 50.

During the argument I tried more than once to induce counsel to deal with sect. 4, sub-s. 3, and sect. 8, but did not succeed. The case of *Ramsey* v. *Margrett* (1) was referred to. The facts and the question in that case are wholly different from the present case. In that case the wife, who had separate estate, agreed to purchase from her husband some furniture and other personal chattels belonging to him which were in the house in which she lived with him. She stipulated that a receipt for the purchase-money should be given to her, and instructed her solicitor to draw the receipt. After the purchase-money had been paid to the husband he signed

(1) [1894] 2 Q. B. 18.

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a receipt which the wife's solicitor had prepared. This document acknowledged the receipt from the wife of the agreed sum, as the purchase-money "for all my furniture, plate, &c., which I hereby acknowledge are now absolutely her property." There was no formal delivery of the goods by the husband to the wife, but they remained, as they had previously been, in the house in which the husband and the wife were living together. She subsequently sent part of the goods to her own bankers, and the remainder were afterwards taken in execution by a judgment creditor of the husband. There are dicta to the effect that the wife had sufficient possession of the goods to take the case out of the Act, for the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife, who had the legal title; but sect. 4, sub-s. 3, of 41 & 42 Vict. c. 31, is not referred to from the beginning to the end of the case, though sect. 4, sub-s. 1, is.

The decision was that it was not a case of a bill of sale, and Lopes L.J. confined his judgment to this. If the dicta of Lord Esher and Davey L.J. are carefully examined, they will be found to deal with "possession," not with "apparent possession" or its statutory definition. Lord Esher in his judgment says:—"The goods were in the house in which the husband and the wife were living together, and in that state of things you could not say which of them had the actual possession of the goods. What is the rule of law as to possession in such a case? When the possession is doubtful it is attached by law to the title. Therefore, the law considers the goods to be in the possession of the wife, who has the legal title to them." That is, she had the legal title by her purchase wholly apart from any bill of sale. Lord Esher's remarks, therefore, do not apply to this case—1, because here the claimant had no legal title apart from this impeached bill of sale; 2, because Lord Esher does not deal with "apparent possession" as defined by the Act, but with possession under the general law.

Lopes L.J. mentions "apparent possession," but expresses no opinion on the question. Davey L.J. says—"In the present case the question of 'possession' arises." He cites Pollock and Wright on Possession:—"Where 'possession' in fact is undetermined, possession in law follows the right to possess." He then cites

Charlesworth v. *Mills* (1) to the effect that if the Act of 1878 applied, ostensible possession might be important, "but it is not of the slightest importance in the present case," i.e., in *Charlesworth* v. *Mills* (1). Why? Because the Act of 1878 did not apply at all in that case except sect. 3, sub-s. 1. Later on he says:—"The fact that the goods remained in the house as before was equally consistent with their being in her possession as in his possession. If there had been a formal delivery of the goods to the wife, there could have been no question." The last sentence seems to show conclusively that Davey L.J. cannot have had his attention called to the distinction between "possession" and "apparent possession" and the statutory definition of the latter in the Act of 1871, as the final clause of sect. 4, sub-s. 3, makes the "formal" giving of possession immaterial in the case of "apparent possession."

The only other case we were referred to was *In re Satterthwaite, Ex parte the Trustee* (2). It was only mentioned as being to the same effect as *Ramsey* v. *Margrett* (3). On reading it, I find it was an express decision on "apparent possession" and its definition in sect. 4, sub-s. 3, of 41 & 42 Vict. c. 31. It was a motion by the trustees in bankruptcy to have a settlement, comprising inter alia certain furniture, declared void under the provisions of the Bankruptcy Acts and the Bills of Sale Act, 1854. The settlement in question was a post-nuptial settlement, by which the furniture was assigned by the husband to trustees upon trust for the wife absolutely. By an earlier post-nuptial settlement the husband had assigned a leasehold house at Springfield on similar trusts. The evidence showed that the husband lived with his wife in the house at Springfield, but the wife out of her own property kept up the house, paid the wages, and in particular dealt with the furniture as her own, selling some articles and buying others out of her own pocket, or getting them repaired. Vaughan Williams L.J. in his judgment says:—"Even supposing that the Act does apply, it only applies if, possession having been given, the goods remain in the apparent possession of the grantor. Look at the definition." [His Lordship read sect. 4, sub-s. 3, and

(1) [1892] A. C. 242. (2) 2 Manson 52. (3) [1894] 2 Q. B. 18.

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continued :] "Here the goods were not in any place occupied by the grantor. Springfield—the place where they were—was occupied by the wife . . . The occupation was the occupation of the wife and not of the husband."

It is quite plain on the Act that even if the wife was in possession in point of law, still if the husband was in apparent possession as defined in sect. 4, sub-s. 3, sect. 8 would apply and avoid the deed.

In this case the house was and is the husband's, and his alone. He has always occupied it. The chattels have always remained there.

Every fact on which Lord Justice Vaughan Williams based his decision in that case is absent in the present case, and the dicta in *Ramsey* v. *Margrett* (1) do not apply to "apparent possession" at all. In my opinion the present case is within sub-s. 3 of sect. 4 of the 42 & 43 Vict. c. 50, and the deed is void under the 8th section of that Act.

Solicitor for the appellant: *John Moran.*

Solicitor for the respondents: *B. M. O'Grady.*

H. J. M'C.

(1) [1894] 2 Q. B. 18.

THE KING (AT THE PROSECUTION OF WILLIAM REDMOND) *v.* M. BARRINGTON JELLETT, A JUSTICE OF THE PEACE FOR THE COUNTY OF DUBLIN (1).

K. B. Div. 1918. Nov. 11, 12.

Justices—Sureties for the peace and good behaviour—Summary jurisdiction—Criminal Justice Administration Act, 1914 (4 & 5 *Geo. 5, c. 58)—Right to call witnesses—Insufficiency of evidence—Power of superior Court to examine evidence.*

An information having been sworn that the prosecutor R. used threats towards W. and others calculated to provoke a breach of the peace and to put W. in fear, a justice issued a warrant on which R. was arrested, and brought before the justice sitting in the local Petty Sessions courthouse. Evidence was there given by W. of the use of the threatening language complained of, and by a sergeant of police that the prosecutor was a man of bad character, that three named persons had refused to employ him on account of his bad character, and that on a certain date at the Dublin City Commission he had been convicted of sheep-stealing, and had pleaded guilty to cattle-stealing. After hearing the evidence the justice made an Order requiring the prosecutor to enter into recognizances with two sureties to keep the peace, and be of good behaviour for a term of twelve months, and in default of such sureties and entering into such recognizances, to be imprisoned for six months. This Order purported to be made under statute 34 Ed. 3, c. 1. On an application for a writ of certiorari to quash the Order, *Held*, 1. That the justice was sitting as a Court of summary jurisdiction, and that the prosecutor was entitled, under the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), to call witnesses: *R.* (*Garvey*) v. *Armagh Justices*, [1918] 2 I. R. 94, overruled. 2. That when a justice is sitting as a Court of summary jurisdiction, and the accused can call evidence, and the Order of the justice shows on its face facts necessary to give jurisdiction to make the Order, it cannot be quashed on the ground of the insufficiency of the evidence.

R. (*Orr*) v. *Londonderry Justices*, 28 L. R. Ir. 440, distinguished.

CERTIORARI.

Motion to make absolute a conditional order for a writ of certiorari directed to M. Barrington Jellett, a justice of the peace for the county of Dublin, for the purpose of bringing up to be quashed an adjudication made by him at Dundrum on the 27th

(1) Before MOLONY C.J., GIBSON, MADDEN, DODD, and MOORE JJ.

K. B. Div. 1918.

THE KING (REDMOND) v. JELLETT.

September, 1918, on a complaint by C. H. O'Hara, District Inspector, Royal Irish Constabulary, against the prosecutor, William Redmond, whereby it was ordered that the prosecutor should forthwith enter into a recognizance in the sum of £50, with two sureties of £25 each, to keep the peace and be of good behaviour, and that if he failed to comply with that order he should be imprisoned for six months.

The facts appear sufficiently from the judgment.

M'Gonigal K.C. (with him *M'Grath K.C.*, and *Kavanagh*), for the prosecutor:—

1. The justice was acting as a court of summary jurisdiction. By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), sect. 43, sub-s. 11, "the expression 'Court of summary jurisdiction' shall mean any justice or justices of the peace or other magistrate by whatever name called to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law." Every justice is a Court of summary jurisdiction in all matters pertaining to the exercise of summary jurisdiction by magistrates, however he may have derived his authority to exercise it: per Lord Herschell, in *Boulter* v. *Kent Justices* (1), at p. 571. The Court was a Court of summary jurisdiction, because the justice was exercising a jurisdiction similar to that conferred by the Summary Jurisdiction Acts, although his jurisdiction in the particular case may have been derived, not from the Summary Jurisdiction Acts, but from some other Act, or from the Common Law: *Hagmaier* v. *Willesden Overseers* (2). The prosecutor was therefore entitled under sect. 43, sub-s. 11, of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), to call witnesses and tender evidence, and he was not given the opportunity of doing so. The decision in *R.* (*Garvey*) v. *Armagh Justices* (3) was wrong in so far as it decided the contrary. It would have been useless for the prosecutor to tender evidence, because the justice

(1) [1897] A. C. 556. (2) [1904] 2 K. B. 316.
(3) [1918] 2 I. R. 94.

under that decision would have told him that he could not give it.

2. The order is bad, because the justice was influenced by illegal evidence. Evidence of a general kind of bad character is admissible under 34 Edw. 3, c. 1; but the evidence here was hearsay evidence of particular facts. If it is proposed to prove a conviction, the record of the judgment must be produced and the individual identified (34 Vict. c. 112, s. 18).

Henry K.C. (with him *Cooper*), for the justice:—

The governing words of sect. 13, sub-s. 11, of the Interpretation Act, 1889, are—"to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts"; those Acts are defined in sect. 13, sub-s. 9, and are the Petty Sessions Act, 1851, and any Act amending the same. The Summary Jurisdiction Acts do not apply to applications to bind persons over: *Quinn* v. *Pratt* (1). There was no application for an adjournment, and the prosecutor named no witness whom he wished to call. On the facts, there is no ground for certiorari: *R.* v. *Glamorgan Justices* (2).

M'Grath K.C., in reply.

The judgment of the Court was delivered by MOLONY C.J.:—

On the 27th September, 1918, Joseph White, who is a steward to Colonel Erck of Shankill, swore an information before Mr. M. Barrington Jellett against William Redmond. It appears from the information that on the 17th of September last Colonel Erck was getting some threshing done, and that Redmond came to Colonel Erck's place with a threshing machine belonging to Mr. Henry J. Fox of Kilternan, and asked for employment, which was refused. On the following morning he came again, and claimed that the men employed should get 12*s.* a day, but Joseph White made an arrangement with the men at 10*s.* a day, and again refused to employ Redmond. On the next day Redmond came back again, and made use of the language complained of.

(1) [1908] 2 I. R. 69.

(2) 53 J. P. 435.

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On an information being sworn, the ordinary course for Mr. Jellett to have pursued would have been to issue a summons under sect. 11, sub-s. 2, of the Petty Sessions (Ireland) Act, 1851, and it might have occurred to him that this course would have been specially suitable in the present case, where the threats had been spoken eight days previously, and the ordinary Petty Sessions Court would have been held in three days. Assuming that there is power to issue a warrant in the first instance, this power should only be exercised in grave cases where serious personal violence immediately following the threats might be apprehended. In the present case Mr. Jellett considered, for reasons which were no doubt satisfactory to himself, but which I do not altogether appreciate, that the issue of a warrant was desirable, and he accordingly issued a warrant in the form prescribed by the Petty Sessions Act, in which the complaint was stated to be that on the 19th September, 1918, at Shankill, in the county of Dublin, the defendant had used threats towards Joseph White and others calculated to provoke a breach of the peace and to put him in fear. Redmond was arrested at 7 o'clock on the evening of the 27th September, and brought to the police station at Dundrum, and afterwards to the courthouse, which is in the same building. Mr. Jellett shortly afterwards appeared and proceeded to hear the evidence of Joseph White and Sergeant Lawton, R.I.C. Joseph White repeated the statements to which he had already deposed in his information, and Sergeant Lawton then gave evidence to the effect that Redmond was a man of bad character who could not get employment owing to his bad character, and he gave the names of three persons who, owing to his bad character, had refused to employ Redmond. He also deposed to the fact that on the 5th February, 1918, at the Commission in Green Street, Redmond had been convicted of sheep-stealing, and had pleaded guilty to cattle-stealing, and had been sentenced to eight months' imprisonment.

It is no doubt open on an application for sureties of the peace to give evidence that the accused was not of good fame within the meaning of 34 Edw. 3, c. 1, but it is difficult to see how a statement of the sergeant as to the three persons whom he said had refused to employ Redmond on account of his character could have been relevant.

After hearing the evidence Mr. Jellett made an order requiring Redmond to enter into recognizances himself in £50 and two sureties in the sum of £25 each to keep the peace and be of good behaviour towards all His Majesty's subjects, and particularly Joseph White, for a term of twelve months, and in default of finding such sureties and entering into recognizances as aforesaid, to be imprisoned in Mountjoy jail for six months, unless he should sooner enter into the said recognizances. The order purports to be made under the provisions of 34 Edw. 3, c. 1, and it is now sought to quash the said conviction on the ground: 1, that William Redmond was precluded from giving evidence by the decision of the King's Bench Division in the case of *R.* (*Garvey*) v. *Armagh Justices* (1) and by the magistrate; and 2, that the order and sentence were influenced by illegal evidence. If *Garvey's Case* (1) were rightly decided, it would appear that Mr. Jellett was not sitting as a Court of summary jurisdiction, and that consequently the provisions of sect. 43, sub-s. 13, of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), did not apply. In *Garvey's Case* (1) the conditional order for certiorari was obtained on the ground that the order complained of was made without giving the accused an opportunity of calling witnesses for the defence, and thereby amounted to a denial of justice. It appeared from the affidavit of Henry Caraher, the complainant, that the accused never expressed any wish to call witnesses, nor did he state that he had any witnesses, or that he would call any witnesses, nor did he ask for an adjournment to call witnesses, or for the attendance of a solicitor. If this statement was accepted by the Court, as it apparently was, it would appear that there were no grounds for the conditional order; but the Lord Chief Justice proceeded to discuss the question of law as to whether it was possible for the accused to tender evidence at the hearing, and came to the conclusion that the provisions of the Criminal Law Administration Act do not apply where justices by virtue of the jurisdiction inherent in them under their commissions bind over an individual with sureties to keep the peace and be of good behaviour. Unfortunately the attention of the Lord Chief Justice had not been called to the definitions of "Court of

(1) [1918] 2 I. R. 94.

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summary jurisdiction" and "summary jurisdiction" in the Petty Sessions Act, 1851, and in the Interpretation Act, 1889, and 20 & 21 Vict. c. 43, held to apply to peace cases. Had his attention been specifically drawn to these statutes, he would not, I think, have arrived at the conclusion at which he did. Under sect. 44 of the Petty Sessions (Ireland) Act, 1851, the expression "summary jurisdiction" shall be deemed to mean any case as to which a summary conviction or order may be made by a justice or justices out of Quarter Sessions, and "summary proceedings" shall mean any proceeding in respect of such case. This is undoubtedly a proceeding out of Quarter Sessions, and is a summary proceeding within the definition.

The matter is, however, made still more clear by the Interpretation Act, 1889, which, in sect. 13, sub-s. 11, enacts that the expression "Court of summary jurisdiction" shall mean any justice or justices of the peace or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission or under the common law; and sect. 13, sub-s. 9, enacts that the expression "the Summary Jurisdiction (Ireland) Acts" shall mean, as regards the Dublin Metropolitan Police District, the Acts regulating the powers and duties of justices of the peace or of the police of that district; and as respects any other part of Ireland, the Petty Sessions (Ireland) Act, 1851, and any Act, past or future, amending the same. It is clear that a magistrate, when he is sitting out of Petty Sessions for the purpose of hearing an application for sureties, is acting as a Court of summary jurisdiction: *Boulter* v. *Kent Justices* (1); *Hagmaier* v. *Willesden Overseers* (2). This being so, the provisions of sect. 43, sub-s. 13, of the Criminal Justice Administration Act, 1914, apply; and accordingly, when the defendant was called upon to show cause why he should not be bound over to keep the peace or be of good behaviour, he was entitled to call witnesses and tender evidence at the hearing of the complaint. It is alleged in the present case that the accused

(1) [1897] A. C. 556. (2) [1904] 2 K. B. 718

was deprived of the benefit of this section, and there is a good deal of controversy as to what really happened at the close of the evidence. Redmond has made two affidavits somewhat inconsistent in character. In the first affidavit, sworn 24th of October, 1918, he represents himself as having been dazed and dumbfounded by the proceedings, and unable to comprehend them, while in his second affidavit, sworn six days later, he says that he informed the magistrate that he had three witnesses, namely, the engine-driver, Copeland, and the two feeders, whom he wished to produce, and that he asked the magistrate to allow him time to do so, but that his application was refused. On the other hand, Mr. Jellett and Sergeant Lawton, both in precisely the same terms, say that it is not true that Redmond said he had three witnesses, and asked for time to produce them, but that what he did say was that he could prove that he followed Fox's machine to get work, and that he did get work from farmers at threshings.

We are not satisfied that the accused ever requested the magistrate to give him time to call witnesses and tender evidence; and if he had made such a request, we find it difficult to think that an application so manifestly proper would have been refused. We are consequently unable to find that William Redmond was, in fact, precluded from giving evidence, but we are equally satisfied that he was entitled to call witnesses and tender evidence, and that the decision of the Court in *R.* (*Garvey*) v. *Armagh Justices* (1), in so far as it purports to decide otherwise, cannot be supported.

Admitting now that Mr. Jellett was sitting as a Court of summary jurisdiction, and that the defendant at the hearing of the complaint was entitled to call witnesses and tender evidence, the question arises as to whether we have power to examine the evidence and to quash the order if we are of opinion that the evidence was not sufficient to sustain it, or that the order was influenced by illegal evidence. In *The Queen* (*Robert Orr and others*) v. *The Justices of Londonderry* (2) it was decided by this Court that upon a motion for certiorari to bring up orders made by justices at Petty Sessions requiring persons to find sureties to

(1) [1918] 2 I. R. 94. (2) 28 L. R. Ir. 440.

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keep the peace and be of good behaviour, the Court has jurisdiction to examine the evidence given before the justices, and to quash orders made on insufficient evidence. This latter case was, however, referred to and distinguished in *The King* (*Martin*) v. *Mahony* (1), where Palles C.B. said in reference to it (p. 721):—"Its ratio decidendi was the anomalous nature of the procedure in this country in relation to compelling such sureties to be found—a procedure according to which the person sought to be compelled to provide sureties is not permitted to produce witnesses to contradict the case made against him."

It seems to us that when, as here, the justice is sitting as a Court of summary jurisdiction, and the accused can call witnesses and tender evidence as he now can, and the order of the justice shows on its face the facts necessary to give jurisdiction to make such order, *The King* (*Martin*) v. *Mahony* (1) applies, and the order cannot be quashed on the ground of the reception of illegal evidence. We do not, however, decide that *The King* (*Martin*) v. *Mahony* (1) necessarily applies in every case where an order is made for sureties of the peace and good behaviour.

The result is that we cannot yield to the application of the defendant, and, therefore, the conditional order must be discharged.

Speaking for myself, I wish to express my regret at the result, as I cannot help feeling that the defendant has been harshly treated. I agree with and adopt the words of my predecessor, Lord O'Brien, in *The King* (*Martin*) v. *Mahony* (1), where he said:—"In all matters of procedure the essentials of justice must be observed. It is one of the essential requirements of justice that a charge shall be duly formulated; that an accused person shall have due notice of it; and that he should be given an adequate opportunity of defending himself. Such matters are not mere formalities; they are the essential requirements of justice."

In the present case, without any notice, the accused person is arrested at 7 o'clock in the evening, and brought at once to the courthouse at Dundrum. There does not seem to have been any necessity for issuing a warrant, and it could not be contended that

(1) [1910] 2 I. R. 695.

a casual labourer with eleven children would be likely to disappear before the next Petty Sessions Court, which was to be held three days subsequently. He had not any real opportunity of procuring evidence, or of consulting his friends, or of obtaining legal advice; and in the end he is ordered to enter into a recognizance —himself in £50 with two solvent sureties in the sum of £25 each—to keep the peace and be of good behaviour, or, in default, to be imprisoned for six months. I do not consider it reasonable that a person in the position of a casual labourer should be asked to find sureties in so large an amount, and, in default, to be imprisoned for so long a period for an offence of using threatening language a week previously; and it would be well for a justice to remember that although the amount of bail is in his discretion, he should, as is pointed out in Hawkins (2 Hawkins, c. 15, s. 4), be guided by the ability to give bail, the quality of the person, and the nature of the offence; and he should also remember that the Bill of Rights (1 Wm. and Mary, Sess. 2, c. 2), which is itself only declaratory of the common law, provides that excessive bail shall not be required. It is also to be noted that in England a magistrate, sitting, as Mr. Jellett sat here, in a Court of summary jurisdiction, could, under the 25th section of the Summary Jurisdiction Act, 1879, have only given the defendant fourteen days' imprisonment in default of compliance with his order. I would be glad if there was a similar provision in this country; but it is my duty to administer the law as I find it, and within the law I am unable to give any relief in the present case.

Solicitor for the prosecutor: *E. M'Hugh.*
Solicitor for the justice: *H. A. Wynne.*

M. G. E.

K. B. Div. 1918.

Nov. 6, 18.

COUNTY COUNCIL OF DONEGAL AND PATRICK DOHERTY *v.* MARGARET M'CROSSAN AND ELIZABETH M'CROSSAN (1).

Poor-rate—Person rated not in occupation—Liability of person in occupation, but not rated—1 & 2 Vict. c. 56, ss. 61, 71.

At a time when a poor-rate was made in respect of certain lands, the person rated was not in occupation of the premises, but when the rate was made, and during the whole of the period for which it was made, the defendants were in occupation.

Held, that the defendants were not liable for the rate.

Case Stated by Mr. Justice Gibson on the hearing of a Civil Bill Appeal at the Summer Assizes for the county of Donegal, 1918.

By the civil bill the County Council of Donegal and Patrick Doherty, their rate-collector, sued for £12 3*s.* 4*d.* poor-rate, payable for the years 1907–1908 to 1916–1917, in respect of certain lands, the property of the defendants. During the period prior to the year 1914–1915 Mary Breslin, the sister of a former tenant of the defendants, was in possession and occupation of the lands in question, and was rated as the occupier thereof.

The defendants admitted liability for the poor-rate for the subsequent years, and tendered the amount due in respect thereof.

The question for decision was whether the defendants were liable to pay the poor-rate for the period during which Mary Breslin was rated as the occupier of the lands.

Begley (with him *Leech K.C.*), for the plaintiffs:—

Under the provisions of the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), sect. 71, the rate shall be paid by the person in actual occupation of the rateable property. The person who is in fact in occupation is liable, although he is not named. The

(1) Before Dodd and Gordon JJ.

county council must follow the list as made by the Commissioner of Valuation. The county council have no power to amend it, and the name set out in the list binds the person in occupation: Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63). The county council have no means of ascertaining what assignments of the property may have been made. The Poor Relief Act, 1838, sect. 70, shows that the rate is valid, subject to appeal, although the person named as occupier may not be in occupation. Under sect. 76 of the same Act, and the Poor Relief Act, 1843, sect. 6, the rate may be raised by distress on the premises, no matter who is in actual occupation or owner of the chattels found there; and under sub-s. 106 "any person" aggrieved by a rate may appeal against it, and not merely the persons named as occupiers and persons subsequently in occupation. [They referred to Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), ss. 78, 106, 107, 108, 109, 110; Poor Relief (Ireland) Act, 1843 (6 & 7 Vict. c. 92), s. 6; Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63), ss. 17, 27; Valuation (Ireland) Act, 1854 (17 & 18 Vict. c. 8), s. 4; Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), s. 52.]

Wylie K.C. and *Wood*, for the Local Government Board:—

"The person in actual occupation of the rateable property at the time the rate is made" is liable to pay the rate under the Poor Relief (Ireland) Act, 1838, sect. 71. The name of the occupier of the premises is inserted for the purpose of identification of the tenement: cf. Instructions issued under the Valuation (Ireland) Acts, Vanston, 603.

[They referred to *R.* v. *Churchwardens of Andover* (1); *R.* v. *Inhabitants of Fordham* (2); and *R.* v. *Eastern Counties Railway Company* (3).]

Osborne K.C. and *Chadwick*, for the defendants:—

It is only a rate "made under the authority of this Act" which the person in actual occupation of the rateable property is compelled to pay under the Poor Relief Act, 1838, sect. 71. The name of the occupier must be inserted. See Poor Relief

(1) 2 Cowp. 550. (2) 11 Ad. & E. 73. (3) 5 E. & B. 974.

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Act, 1862, sect. 12. The Annual Revision of Rateable Property (Ireland) Act, 1860 (23 & 24 Vict. c. 4), sect. 6, recognizes that a rate which follows the list made out by the Commissioner of Valuation may be invalid; and by sect. 6, empowers the local authority to make such departure from the list as may be necessary to enable them to make a valid rating.

[They referred to *Milward* v. *Caffin* (1); *Guardians of Limerick Union* v. *White* (2).]

DODD J.:—

This is a case stated by Mr. Justice Gibson at the Summer Assizes for Co. Donegal, 1918. The civil bill was for rates. The County Court Judge gave a decree. The question for our determination is—Were the defendants liable to pay rates for the period before 1915, during which Mrs. Breslin was rated occupier? Mrs. Breslin was rated, but was not in occupation. The defendants were in occupation, but were not rated. The question is a simple one, but the discussion has ranged over a wide area, commencing with the 43 Eliz. c. 2, and touching a case still under adjudication in the Court of Appeal.

It is becoming more and more important for a Court of construction to indicate clearly what is not decided, as well as what is decided; and without any discourtesy to the counsel who urged many considerations from old authorities, I content myself with endeavouring to apply so much of the law, and so much only, as bears upon the plain facts of this case.

I accept the principle contended for by Mr. Wylie that a poor rate is a tax payable by a person in respect of land. If houses are to be contradistinguished from land, as for some purposes they are, in the striking of a rate, it may be well to add, "and in respect of houses and buildings." The words "in respect of land" may be more accurately put—"in respect of the occupation of land." Thus interpreted, his definition is accepted.

In this case a lady was rated who was not in occupation of either the land or buildings in respect of which this rate was made at the time it was made. No doubt, she might have appealed—(*a*) to the Commissioner of Valuation against his inserting her

(1) 2 W. Bl. 1329. (2) 2 I. C. L. 630.

name as occupier in the valuation list, and (*b*) from his adjudication to the County Court judge—15 & 16 Vict. c. 63, ss. 18–23. His decision is final, and it is upon such list that the county council are to make the poor-rate (sect. 27).

Notwithstanding these sections, it is clear law, that cannot be challenged, that Mrs. Breslin, if sued, whether she had appealed or had not appealed, could impeach the validity of the rate on the ground that she was not in occupation when the rate was made. The reason of the law is this: unless she were "occupier," there was no jurisdiction to assess her. I quote from Mr. Justice Gibson, *New Ross Union* v. *Byrne* (1) :—"Where a rate is made in respect of premises of which the person rated is not occupier, the rate is made without jurisdiction, and the person rated, notwithstanding that he has appealed, and appealed unsuccessfully, can set up the invalidity of the rate by way of defence to any proceeding to recover it. This proposition is established by a chain of authorities which it would require a statute to overrule."

If the rate-making authority strike a rate on a person who is not an occupier at the time the rate was made, can they have resort to the person who was in actual occupation, and say the rate must be taken to be made on him as occupier? I do not know that it was contended in the argument that, apart from express statutory authority, such a rate would be valid. I have in so many words, in the *North Dublin Rural District Council* v. *Walsh* (2), stated that it would be invalid. I treated that statement of mine during the argument as having been merely an obiter dictum, not binding even upon myself; but it was something more than that. The contest in that case was whether what was called a water-rate was, or was not, a part of the poor-rate, and to be levied as such. If it were, the rate assessed was invalid, because the three requirements of the law applicable to poor-rate, viz., the names of the parties rated, the valuation, and the amount assessed upon them, were not set out; and for that proposition, *Rex* v. *Undertakers of the Aire and Calder Navigation* (3) was cited. The water-rate was to be paid by such occupiers within the district as should apply for and get a supply of water to their premises.

(1) 30 L. R. Ir. 160, at p. 164. (2) [1917] 2 I. R. 86, at p. 92.
(3) 2 B. & C. 713.

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In the *Rathdrum Rural District Council* v. *Saul* (1) this Court decided that such a water rate was part of the poor-rate, and to be included as such by the county council. But the Court of Appeal held that as no named occupier could be inserted in the rate, unless the maker of the rate were a prophet, and knew beforehand the names of such occupiers as should take advantage of the water-supply, it wanted an essential quality of a poor-rate, and was, therefore, a rate to be assessed by the rural district council for special advantages conferred upon such occupiers as should avail themselves of them. "I am at a loss," said Holmes L.J., "to see how such a rate can be added to the poor-rate." Though there was some sanction, therefore, for my decision, it was not absolutely essential, and, in any event, I spoke only for myself, and it is open to me now to reconsider that statement. But after full consideration, and in a case where it does form part of my decision, I hold that, apart from statutory provision, a person, though in occupation, who is not named or described as occupier in the rate, is not liable. He is not rated. He is not a "rated occupier." I add the word "described," though it is not quite accurate, from the decisions quoted by Mr. Justice Gordon. If the person can be definitely identified, that is sufficient.

Counsel for the plaintiff, and counsel for the Local Government Board, whom we invited to assist us, say there is such provision in the statutes. Mr. Wylie relies on sect. 71 of the 1 & 2 Vict. c. 56. This section is to be read along with sect. 61, and the whole case, in my opinion, turns upon the true construction of these two sections. I do not forget the numerous sections relied upon by Mr. Leech, which, according to him, assume the validity of a rate in which a wrongful occupier is named. These will be dealt with by me by-and-by. But the struggle is over sect. 71.

Mr. Wylie's argument is to the following effect:—Sect. 61 enacts that the rating authority "shall from time to time make and levy such rates as may be necessary on every occupier of rateable hereditaments." And sect. 71 runs: "Every rate made under the authority of this Act shall be paid to the person

(1) 39 I. L. T. R. 270.

authorized to collect the same, by the person in the actual occupation of the rateable property at the time of the rate made, and on his default then by the person subsequently in the occupation of the rateable property." The word "rateable" is relied upon. It is not "rated" property. But that, I think, is merely good English. It is rateable until it is rated.

A more difficult question arises upon the words "by the person in the actual occupation of the rateable property at the time of the rate made." It does not say by the person rated under sect. 61. Mr. Wylie urges that, whoever is named in the rate made under sect. 61, the person in actual occupation is liable to pay under sect. 71. If this were correct the column might, therefore, be left blank, or the words "occupier for the time being" might be enough.

In the rate under review in *Rex* v. *Undertakers of the Aire and Calder Navigation* (1) the rate was on a person named, but had appended "or occupier." Could a fictitious person be inserted, say, "John Doe," and would that be a good rate against the person actually in occupation? The actual occupier might conceivably appeal as an aggrieved person, whose name had been wrongfully omitted. But is a rate made on a fictitious person a rate made under sect. 61 on an "occupier of rateable hereditaments"? Is a rate made in blank a rate made on an occupier? The name of Mrs. Breslin being struck out, on the ground that no rate was made as against her, is not what remains of the rate left suspended without any foundation upon which to rest? Does not sect. 71 presuppose that a valid rate has been made under sect. 61 on a person in actual occupation of the rateable premises? And is there anything in the section to reverse or alter the principle which, but for this section, I hold to be established by the authorities, that to make a rate good the occupier must be rated. I think I have covered all Mr. Wylie's contention, and I am of opinion that sect. 71 does not afford any basis for the contention that it is a statutory enactment altering the common law.

The argument from inconvenience has been pressed. A person may be in actual occupation at the time the valuation list is made,

(1) 2 B. & C. 713.

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and out of occupation before the rate is struck. Provision is made for that in the Act. The actual occupier can be inserted before the rate is made (23 & 24 Vict. c. 4, sect. 6). Mr. Leech relies on this section to show that a valid rate may be made with a wrong person named as occupier. I think it is the other way about. If it applies to an alteration in the column headed "occupier," as it is alleged, then the county council have under certain limitations power "to make such departure, not affecting value, from the particulars contained in the said lists as may be necessary at the time of making the rate to make a valid rating." As to this power to make a valid rating under this section, see Mr. Justice Gibson's hints in *New Ross Union* v. *Byrne* (1), at p. 171.

Of course some inconvenience might arise if a person in occupation at the time of the valuation list should cease to be in occupation a day, say, before the rate was made, when the county council could not know of the change. But that is not of itself sufficient to control the interpretation of the section.

The contingency probably does not frequently arise. The next assessment can cover the break. Here the county council allowed the wrong occupier to be inserted for some three years. It may also afford an opportunity to evade the rate. A husband might assign his land and buildings to his wife. She might be rated as occupier. He might resist a civil bill for the rates on the ground that he was not in occupation. His wife might resist a civil bill on the ground that she was not rated. It is to be remembered, however, that occupation is a question of fact, and it is further to be remembered that their neighbours are interested in having all rateable property rated. It is to be remembered that county officials must be kept up to their duty. But in any event none of these contingencies can supply the want of a statutory enactment.

It is scarcely necessary to add that the omission of the rated occupier's name from the rate could not in the view I have taken be an omission that could be disregarded under sect. 13 of the 19 & 20 Vict. c. 63, applied by adaptation under the Privy Council Order of 30th January, 1899. The omission goes to the validity of the rate.

(1) 30 L. R. Ir. 160.

But the inconvenience is not altogether one way. In this case two ladies appear to have been in actual joint occupation of the entire of the rated premises at the time the rate was made. Suppose four persons had been severally in occupation each of a part. Could the collector distrain on the goods of one for the entire poor-rate, or for part, and if so what part, on each? Or suppose even here one of the ladies had been in occupation of the house and another of the land, who should be sued? In all such cases the collector would have added to his other duties the duty of proving occupation at the time the rate was made. The warrant would cease to be a warrant.

From the case stated by the learned judge it appears he was inclined to hold that section 61 "did not impose liability on the defendants if the rate was intrinsically invalid"; but as other enactments not before the judge might affect the question, he stated the case. Mr. Leech now cites before us these enactments, in a good deal of detail, and it is necessary to deal with them. In addition to sect. 71 (2 Vanston, 652) he relies on sect. 70; and as his contention is based upon the same reasoning in regard to the other sections, I examine this section particularly. It provides for notice and inspection of rates before the rate is levied. But it calls it a rate. It is a rate that can be challenged. Mr. Leech suggests it is recognized as a valid rate subject only to appeal. That, I think, is against him. It assumes that the rate struck under sect. 60 is a valid rate. If it is intrinsically invalid, whether appealed against or not appealed against, it cannot be enforced. He relies on sects. 78, 106, 107, 108; 109, and 110 (2 Vanston, 658, 659). Those are sections regulating appeals. They again assume a valid rate. But if the rate be invalid, that it can be appealed against does not cure the invalidity.

All these sections can be turned against him, for they clearly point to the rate made under sect. 61 being a valid rate, and not an invalid one; and if one of the essential elements of a valid rate be not complied with, the rate in that particular instance is without validity. He relies on sect. 6 of the Poor Relief Act, 1843 (2 Vanston, 666):—"Goods and chattels, to whomsoever the same shall belong, found on any premises in respect of which any person is or shall be rated as the occupier, or as occupier of

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which he is liable to pay the rate, shall be liable to be distrained." This section, so far as it affects the question at all, points to a valid rate against a named occupier, or a person succeeding such a rated occupier, in the actual occupancy of the rated premises. I need not, I think, pursue this inquiry further. These are the strongest sections he relies upon. He cites the Valuation Act of 1852, sects. 17 and 27 (2 Vanston, 733), and the Valuation Act, 1854, sect. 4 (2 Vanston, 742). He calls in aid the Local Government Act, 1898, sect. 52 (1 Vanston, 7, 55), and sect. 105 (1 Vanston, 109), the Local Government Order, 1899, (1 Vanston, p. 297), and the instructions under the Valuation Acts (1 Vanston, 597), but they do not carry him further. They are to the same effect. He relies also on the section of the Grand Jury Act, 1856, to which I have already referred, that rates are not to be affected by reason of any error, omission, misdescription, or variance in the making of such valuation or revision. I have already dealt with this. There must first be a valid rate. Those, I think, are all. One general observation I permit myself to make. If the requirements of a valid rate are to be modified or altered by statute, it must be by clear and express words. It cannot be done by implication.

Mr. Osborne in a clear argument, all the more convincing from its being compressed, said that under all these provisions of the statutes *an* "occupier" must be in occupation in order that a valid rate may be made. If *the* occupier in the rate be not the occupier in fact, there is no valid rate made. He refers to the Poor Relief (Ireland) Act, 1862 (2 Vanston, 796). The Legislature there did alter the common law requirements, and permitted the column headed "occupier" to be filled with the word "empty." That Act is confined to houses; this is a case of land. No statutory provision has been made for a case of this kind. I agree. It is enough for me to say that if I am right in interpreting the requirements of a valid rate in *North Dublin Rural District Council* v. *Walsh* (1), considered and adopted in the first part of my judgment, I can find nothing in the section referred to to alter or modify, and much to confirm, the opinion thus formed.

(1) [1917] 2 I. R. 86.

GORDON J.:—

The question to be decided in this case is: where a county council have assessed for poor rate a person who is not at the time the assessment is made in occupation of the lands in respect of which the rate is assessed can they maintain an action for the rate so assessed against the person who was in point of fact in occupation of the lands at the time this assessment was made? The answer to this question depends upon the construction and effect of the statutes relating to the matter. By sect. 51, sub-s. 5, of the Local Government Act, 1898, the county council is empowered to raise the amounts required by them for the purposes mentioned in the Act, apportioned to any part of the county which is not an urban district, by means of the poor-rate; and by sect. 52 this poor-rate shall be made upon the occupier, except in the cases specified. The present case is one in which the rate should have been made upon the occupier. This at once raises the question: how is the rate to be made on the occupier? And to ascertain this we must look, in the first instance, to the provisions of the Poor Relief (Ireland) Act, 1838. By sect. 61 of that Act it is provided that the rating authority "shall from time to time make and levy such rates as may be necessary on every occupier of rateable hereditaments in or arising within such union"; and sect. 65 provides that every such rate shall be entered in a book which shall contain an account of every particular set forth at the head of the respective columns in the form given in the second schedule to the Act. The form in that schedule contained a column headed "name of occupier."

The provisions of sect. 65 were repealed by sect. 10 of 6 & 7 Vict. c. 92, and the Poor Law Commissioners were given power to prescribe the form in which rates should be made and the particulars which should be contained in the rate-book. In pursuance of this power, the commissioners in the form prescribed by them substituted for the words "name of occupier" at the head of the column, the word "occupiers" solely. But the column had still to be filled up. In this state of the law, in the year 1857, a person was indicted for forcibly rescuing cattle from a poor-rate collector, who had distrained them on a warrant made out in respect of a rate in which the occupiers were described as

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"tenants of commons." On a case reserved, the Court of Criminal Appeal held that this was an insufficient description of the occupiers, and did not authorize a distress of cattle grazing on the common. Greene B. said: "If no person be assessed, then there is no rate." And Monahan C.J. said: "In order to make the rate valid, the rate-book must in some way describe the occupier": *The Queen* v. *Boyle* (1) In *The Queen* v. *Higgins* (2), it had been held that "the reps. of T. Kavanagh" was a sufficient description, and in *The Queen* v. *Westropp* (3), it was held that "J. Westropp" was sufficient, without setting out the Christian name in full. These decisions were based upon the opinion of the Court that it was necessary to the validity of the rate that the occupier should be named, or sufficiently described for identification. The form in use now and at the time when the rates in question in the present case were made was prescribed by the Local Government Board in 1904, under the powers vested in that body, and the column dealing with the matter is headed "Persons Rated," and under this one of the sub-divisions is headed "Occupiers." It seems to me, therefore, to be clear that in order to have a valid rate where there is an occupier, the occupier upon whom the rate is made must be named, or at least sufficiently described to be capable of identification; and if this is not done, no valid rate has been made. The Poor Relief (Ireland) Act of 1862 in sect. 12, as pointed out by Mr. Osborne, furnishes a strong argument in support of the view I have expressed. It provides that in the case of an unoccupied building, the guardians shall include such building in the rate describing it in the column appropriated to the name of the occupier or immediate lessor, as the case may be, as "empty." It is also worthy of note that when the Legislature considered that the immediate lessor of premises, valued at not more than £4 per annum, should be made liable for the poor-rate, they considered it necessary to provide, by sect. 1 of the 6 & 7 Vict. c. 92, that if at the time of making any rate the name of the immediate lessor was not accurately known to the persons making the rate, it should be sufficient to describe him therein as "the immediate lessor" without any name or further addition. In *New Ross Union* v. *Byrne* (4), Mr. Justice Gibson says that,

(1) 6 Ir. C. L. R. 598.
(2) 2 Ir. C. L. R. 213.
(3) 2 Ir. C. L. R. 217.
(4) 30 L. R. Ir. 160.

at the time the statutes relating to Ireland were passed, the settled law as to rating established in England, and which has been recognized in many decisions as applying to this country, was, amongst other things, that "where a rate is made in respect of premises of which the person rated is not occupier, the rate is made without jurisdiction, and the person rated, notwithstanding that he has appealed, and appealed unsuccessfully, can set up the invalidity of the rate by way of defence to any proceeding to recover it. This proposition is established by a chain of authorities which it would require a statute to overrule." It is to be observed that the learned judge does not say that the rate is bad or inoperative against the person named who was not the occupier, but he speaks of it as being made "without jurisdiction," and of "the invalidity of the rate," showing, as I understand it, that in his opinion there had in effect been no valid rate made. If I am right in this it would follow if Mr. Justice Gibson's statement of the law is accurate, that Mrs. Breslin, the person rated, admittedly not being the occupier, no valid rate was made. In any event, whether I am right in my construction of Mr. Justice Gibson's statement or not, in my opinion, where the person rated is not in occupation, no valid rate has been made.

But it is contended on behalf of the plaintiffs, and by counsel for the Local Government Board, that sect. 71 of the Act of 1838 makes the person in actual occupation of the rateable premises liable for the rates, though he has not been named as occupier, or even though some other person has been so named. I do not understand that to be the meaning or effect of this section. It relates in terms to "every rate made under the authority of the Act." That must mean validly made; and it directs that the person in actual occupation at the time the rate was made—that is, in my opinion, the only person against whom a valid rate could be made as occupier—shall pay the rate to the collector; and then it provides that on his default in so doing the person subsequently in possession from whom the rate is demanded shall pay it. But it does not say that when the rating authority purport to make a rate which is invalid, or which is not made in accordance with the provisions of the Act, the person at that time in actual occupation of the premises shall pay it.

It is then contended that the name of the occupier set out in

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the list of valuations made by the Commissioner of Valuation must be the name in which the rate is to be made, and that the name so set out is conclusive to indicate and bind the person in actual occupation, whoever he may be, or by whatever name he is known; and sect. 27 of the Valuation Act of 1852 is relied on to establish this. In my opinion the object and effect of this section is to make the Commissioner's valuation the only basis of value upon which the rates can be assessed, and not to make the list of names of occupiers binding upon either the rating authority or the persons rated. If it bound the person rated, the *New Ross Case* (1) would have been wrongly decided. Besides, sect. 6 of 23 & 24 Vict. c. 4, provides that, for the purposes of any poor-rate, the rating authority may make such departure, not affecting value, from the particulars contained in the list as may be necessary, at the time of making the rate, to enable them to make a valid rating.

A further point was made under sect. 13 of the Grand Jury Act of 1856, as altered and adapted by the Adaptation of Irish Enactments Order, 1899, but, in my opinion, that in no way relates to the matter we have to determine in this case.

Three cases were relied on by Mr. Wylie as supporting the plaintiffs' contention: *Rex* v. *The Churchwardens of Andover* (2); *Reg.* v. *The Inhabitants of Fordham* (3); and *Reg.* v. *Eastern Counties Railway* (4); but when these cases are examined it will be found that none of them in reality affects the question we have to decide. In a matter like the present, depending upon the construction of statutory enactments, I am not very much impressed by ingenious suggestions as to how fraudulent persons might embarrass the rating authorities in making or collecting the rates. In practice these dangers are found to be much more imaginary than real, and in any event they cannot justify a Court in disregarding clear statutory requirements. In my opinion the answer to the question submitted by the learned judge is in the negative, and the decree given in the County Court should be reversed, and the civil bill dismissed.

Solicitors for the plaintiffs: *Hamilton & Aiken.*
Solicitor for the defendants: *H. C. M'Cay.*

M. G. E.

(1) 30 L. R. Ir. 160.
(2) 2 Cowp. 550.
(3) 11 Ad. & El. 73.
(4) 5 El. & B. 974.

DONNELLY *v.* VERSCHOYLE AND ANOTHER.

K. B. Div. 1918.
April 29.
May 8.
Appeal.
June 13.

Practice—Costs—Taxation—Action for tort—Separate causes of action—Verdict for £5 upon each cause of action—R. S. C., Order 65, r. 4; Order 18; r. 1.

For the purpose of determining whether a plaintiff in an action for wrong or injury disconnected with contract has or has not recovered a sum exceeding £5 within the meaning of R. S. C., Order 65, r. 4, the aggregation of separate causes of action included in the same proceedings is permissible.

The plaintiff brought an action for assault and false imprisonment. Issues as to assault and false imprisonment, and questions as to the damages for each, having been left to the jury, they awarded the plaintiff the sum of £5 damages on each issue.

Held, by the King's Bench Division (1), and affirmed by the Court of Appeal (2), that the plaintiff had recovered a sum exceeding £5 within the meaning of Order 65, r. 4, and that the Taxing Master was right in taxing the costs upon this basis.

Myers v. *Phelan*, 26 L. R. Ir. 218, discussed.

The following statement of the facts is taken from the judgment of Pim J.:—

This is an application by the defendants in this action to have the taxation of the plaintiff's costs of the action reviewed on the ground that the Taxing Master should not have given the plaintiff such costs.

The action was an action of tort and comprised two causes of action—one for assault, and the other for false imprisonment. It was tried before the Lord Chief Justice and a special jury in December last, and the jury found for the plaintiff on the count for assault, and assessed the damages at £5, and they also found for the plaintiff on the count for false imprisonment, assessing the damages at £5, and judgment was given by the Lord Chief Justice in favour of the plaintiff for £10.

(1) Before PIM and MOORE JJ.

(2) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

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By Order 65, rule 4, it is enacted that if in any action of contract (except for breach of promise of marriage), when the parties reside within the jurisdiction of the Civil Bill Court of the county in which the cause of action has arisen, the plaintiff shall recover, exclusive of costs, a sum less than £20, or in any action for any wrong or injury disconnected with contract (except for replevin, slander, libel, malicious prosecution, seduction, or criminal conversation) a sum not exceeding £5, the plaintiff in any such action shall not be entitled to any costs, unless at the trial of such cause the judge shall certify under his hand that the case was a fit one to be tried in the High Court.

The parties to this action do reside within the jurisdiction of the Civil-bill Court of the county in which the causes of action arose, and the Lord Chief Justice did not give the necessary certificate.

It was contended before the Taxing Master that, although judgment for £10 was given in an action for wrong or injury, yet "action" in that rule meant cause of action, and not the whole proceeding, and that inasmuch as only £5 was given in respect of each cause of action the plaintiff could recover no costs. The Taxing Master disagreed with that view, and gave the plaintiff his costs of the action, and the application before us is to review that decision of the Taxing Master.

Swayne K.C. and *Henry Moloney*, for the defendants and applicants:—

The plaintiff is not entitled to any costs, as he has not recovered a sum exceeding £5 in an action of tort. He cannot add together the two sums recovered in different causes of action to entitle him to costs. By sect. 97 of the Common Law Procedure Act, 1856, if the plaintiff shall recover in any action for any wrong or injury disconnected with contract a sum not exceeding £5, he shall not be entitled to any costs. Order 65, rule 4, merely repeats the words of this statute, which is still in force. Under the Common Law Procedure Act, 1853, s. 54, several causes of action may be joined "in the same summons and plaint," and not "in the same action." The exact point arising here is not covered by authority; but Erle C.J. says, in *Blackmore* v. *Higgs* (1):

(1) 15 C. B. N. S. 790, 793.

"Where there are two causes of action disclosed by the declaration and a distinct line of pleading applicable to each, the two are for the purposes of costs to be treated as being as distinct as if they had been two separate actions." This was approved of by Lefroy C.J., and Lord FitzGerald, then FitzGerald J., in *Devine* v. *London and North-Western Railway Co.* (1).

We rely on *Leonard* v. *Brownrigg* (2), and *Myers* v. *Phelan* (3). If there are two separate causes of action joined in the same writ, and money is paid into Court in respect of one and accepted or found sufficient, the plaintiff cannot add the amount paid in or found sufficient in the one cause of action to the amount recovered in the other cause of action to entitle him to costs under this section: *Blackmore* v. *Higgs* (4); *Walsh* v. *Walsh* (5); *Parr* v. *Lillicrap* (6).

Arkins v. *Armstrong* (7) is overruled. *Palmer* v. *Garrett* (8) followed *Arkins* v. *Armstrong* (7). In *Hughes* v. *Guinness* (9), *Crosse* v. *Seaman* (10), and *Fewster* v. *Boggett* (11), there was only one contract and one cause of action. In *Quinn* v. *Makinlay* (12), which was a case of contract and of a single liquidated amount, the Court expressly refrained from dealing with cases where there were separate causes of action. The views expressed by Fitzgibbon L.J., and Porter M.R., in *Myers* v. *Phelan* (3), contrary to the defendant's contention here, are obiter dicta, and there is no authority to support them. In any event the judgment of Porter M.R. is a dissenting judgment.

W. M'Grath K.C. and *Gerald Farrell*, for the plaintiff:—

The question for decision is, what has the plaintiff recovered in the "action," not what has he recovered in the cause of action? "Action" is defined by the Common Law Procedure Act, 1853, sect. 4, and the Judicature Act, 1877, sect. 3. "Action" may include several causes of action (Common Law Procedure Act, 1853, sect. 54, Order 18, rule 1). The principles which apply to an action

(1) 17 Ir. C. L. R. 174.
(2) 1. R. 6 C. L. 161.
(3) 26 L. R. Ir. 218.
(4) 15 C. B. (N. S.) 790 at p. 793.
(5) 17 I. C. L. R. 195.
(6) 1 H. & C. 615.
(7) I. R. 3 C. L. 373.
(8) I. R. 5 C. L. 412.
(9) 4 I. C. L. R. 314.
(10) 11 C. B. 524.
(11) 9 M. & W. 20.
(12) [1902] 2 I. R. 315.

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of contract equally apply to an action of tort, and in an action for goods sold and delivered it is clear that the amounts recovered upon the different contracts can be added together for the purpose of ascertaining the amount recovered in the action. None of the cases decided dealt with the actual question involved. They are concerned with the questions whether amounts lodged in Court on foot of one cause of action, and accepted in satisfaction of that cause or found by the jury to be sufficient, can be added to the amount recovered by the plaintiff on foot of a different cause of action: *Hughes* v. *Guinness* (1); *Palmer* v. *Garrett* (2); *Byrne* v. *M'Evoy* (3); *Leonard* v. *Browning* (4); *Myers* v. *Phelan* (5); *Devine* v. *London and North-Western Railway Co.* (6); *Walsh* v. *Walsh* (7). In their judgments in *Myers* v. *Phelan* (5), FitzGibbon L.J., at p. 248, and Barry L.J., at p. 255, show clearly that their view was, that in such a case as the present the amounts recovered on different causes of action could be added together for the purpose of ascertaining the amount recovered in the action. The decision in *Blackmore* v. *Higgs* (8) does not conflict with this principle, and from the judgment of Erle C.J. it is manifest that his decision was based on the fact that he regarded the excess in the assault as the plaintiff's only true cause of action. His view as to the principle to be applied in such cases is shown in his judgment in *Danby* v. *Lamb* (9).

Cur. adv. vult.

May 8.

PIM J. [having stated the facts as set forth above proceeded as follows]:—

The order under which different causes of action may be joined in one action is Order 18, rule 1 of which runs as follows:—"Subject to the following rules of this order the plaintiff may unite in the same action several causes of action, but if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or judge may order separate trials of any such causes of action to be had, or

(1) 4 I. C. L. R. 314.
(2) I. R. 5 C. L. 412.
(3) I. R. 5 C. L. 568.
(4) I. R. 6 C. L. 161.
(5) 26 L. R. Ir. 218.
(6) 17 I. C. L. R. 174.
(7) 17 I. C. L. R. 195.
(8) 15 C. B. (N. S.) 790.
(9) 11 C. B. (N. S.) 423.

may make such other order as may be necessary or expedient for the separate disposal thereof."

It is quite clear that "action" in that order means the whole proceeding, and may comprise several causes of action. Rule 4 of Order 65, with which we have been dealing, says "in any action for any wrong or injury," and, apparently, what is aimed at is the proceeding that is brought, not the particular cause or causes of action which may be comprised in it. It has been suggested that, inasmuch as the words "action for any wrong or injury" are in the singular, it must mean an action with only one cause of action, and that, therefore, if two causes of action are included, they will really amount to two actions; but rule 2 of Order 91 provides that the singular number shall include the plural unless there is something repugnant in the context. I see nothing repugnant in the context here. On the contrary, it seems to me that what the drafters of the rule were aiming at was what was to be recovered in the whole action, and not what was to be recovered in respect of any particular part of it.

This rule 4 is to all intents and purposes a copy of sect. 97 of the Common Law Procedure Act of 1856, so that all decisions which have been given under that section can be used in attempting to construe the present rule. We have been referred to a large number of decisions, most of them of considerable help in getting at the meaning of the rule, but none of them dealing with the exact point raised in this case. The last case that arose on the meaning of this rule is the case of *Myers* v. *Phelan* (1). It is a decision of the full Court of Appeal, the judges being Lord Ashbourne C., Lord O'Brien C.J., Sir Andrew Porter M.R., and FitzGibbon and Barry L.JJ. The judges differed, the Lord Chancellor, the Lord Chief Justice, and Lord Justice FitzGibbon taking one view, and the Master of the Rolls and Lord Justice Barry taking the opposite view. The matter arose in this way. There were three counts in the action, each in tort. The parties resided within the jurisdiction of the Civil Bill Court of the county in which the causes of action had arisen, and the jury brought in a verdict for the plaintiffs, assessing the damages at £2 on two of the counts, and they found that £5, which

(1) 26 L. R. Ir. 218.

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had been lodged in Court by the defendants on foot of the third cause of action, was sufficient. It was contended that under this rule the plaintiff was entitled to add to the £5 which had been paid into Court, and which had been found to be sufficient, the £2 awarded by the jury on the other counts, and that, inasmuch as it was an action in tort, the plaintiff was entitled to the costs of the action. The Master of the Rolls and Lord Justice Barry held that he was; the other judges held that he was not, and, so far as I can discover on reading the judgments, on the ground that the £5 was not money recovered in the action. The inference to be drawn, especially from Lord Justice FitzGibbon's judgment, seems to me to be clear that, if the Court had come to the conclusion that the £5 was money recovered in the action, they could not have refused to give the plaintiff his costs of the action.

The same inference may be drawn from the case of *James* v. *Lord Harry Vane* (1). In that case a number of counts in contract had been joined in one action, and the defendant had tendered and afterwards had paid into Court sums of money in respect of several of the counts. The Court, composed of Sir Alex. Cockburn C.J., and Crompton, Hill, and Blackburn, JJ., held that all that was recovered in the action was £2 8*s.* 10*d.*, the amount found by the jury over and above the sums lodged in Court, and that therefore the plaintiff was not entitled to have his costs taxed on the higher scale. It follows logically from the judgment that, if the money paid in had been money recovered in the action, the plaintiff would have been held entitled to his full costs.

Mr. Moloney, who argued this case for the defendants with a very great wealth of knowledge of the law and of the cases, was driven in the end to admit that the words "action for any wrong or injury" contained in rule 4 of Order 65 must mean "cause of action"; and I think he will also admit that, unless the Court holds that it does mean "cause of action," he must fail. Mr. Moloney further says that Lord Justice FitzGibbon's judgment, especially on page 247, shows that the learned Lord Justice considered that the words "action for any wrong or injury" did mean cause of action. I cannot think that that was the meaning

(1) 2 Ellis & Ellis, at page 883.

of the learned Lord Justice, but, if it was, cadit quaestio. There was no need for the rest of his very subtle judgment, for if "action" means cause of action, then it is quite clear that in the case before him, as the plaintiff had not recovered enough in respect of either cause of action, he could not possibly get the costs of the action.

Lord Justice FitzGibbon takes immense trouble to show that the money which had been paid into Court, and which had been held by the jury to be sufficient, was not money recovered in the action. His difficulty was great, and he qualified his decision by the addition of the words "for the purposes of another statute dealing with another cause of action." I need not go through his very subtle and, in parts, not very satisfying judgment, for I think he has himself admitted that, in his view in a case such as we have before us, the plaintiff would be entitled to the costs of the action. On page 248 the learned Lord Justice says:—"On the same grounds I distinguish the authorities which treat any number of debts or torts as cumulative, and hold that where there is an aggregate result in favour of the plaintiff which exceeds the statutory limit he is entitled to costs, as he is plainly entitled to include money lodged and found insufficient in the sum 'recovered' for the purposes of costs."

Mr. Moloney suggests that the word "hold" in that sentence refers, not to the Lord Justice's decision, but to the authorities which he is distinguishing. Unfortunately, there are no such authorities—a matter of which the Lord Justice must have been perfectly aware. In my opinion "hold" there refers to the opinion of the Lord Justice; but even if the word "hold" could be held to refer to some supposed authorities, it is sufficient for my purpose, for it shows that the Lord Justice was not differing from those authorities.

Lord Justice Barry in his judgment, at p. 254, says:—"It is not disputed that, if there are two actions for tort, and the plaintiff recovers £3 in one and £3 in the other, he gets no costs, but that if the plaintiff combines the two actions by bringing one action with two counts, and recovers £3 on each count, he is entitled to full costs." When a judge says in a judgment that something is not disputed, he means that it is not disputed at the Bar or on the

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Bench; and, inasmuch as none of the judges who differed from him suggested that in that matter Lord Justice Barry was wrong, I take it to be the opinion held by all the members of the Court.

Personally, having gone through the cases with much care, I can see no other way of interpreting the rule. It is suggested that it gives rise to hardships. I do not think it does. It seems to me to be altogether in favour of the defendant in an action. If the rule had not been made, the plaintiff would have been forced to bring two actions, or the defendant would have had to pay his own costs in both, between which condition of things and the costs he will have to pay under our order there would be no practical difference. Even if he won in the two actions, he would be worse off than if he won in one action, for he would have to pay the difference between party and party costs and solicitor and client costs in two actions instead of in one; if he had lost in one and won in the other, the result would be roughly the same as in this case, while if he lost in both, his position would be twice as bad. If there had been three causes of action, unless the defendant won in at least two of the three actions, the defendant would be worse off. In any case, whether it may sometimes work apparent hardship or not, we are here to decide what the law is, so far as we understand it; and we hold that the plaintiff is entitled to his costs in this action, and that the Taxing Master was right in his decision.

MOORE J.:—

In this case we are asked to review a decision of the Taxing Master in the following circumstances:—The action was brought by the plaintiff, claiming damages for assault and for false arrest. The defence was not material for the purpose of this judgment, and at the trial the Chief Justice left to the jury, with other issues, a question on the issue of assault, and another question on the issue as to the false arrest, and questions as to damages for each. The jury awarded the plaintiff the sum of £5 damages on each issue or cause of action. The Chief Justice declined to give any certificate that it was a fit case to be tried in the High Court as required by Order 65, rule 4, if the plaintiff is to be entitled to his costs. Judgment was entered for the plaintiff for

£10 damages. The plaintiff's costs were lodged for taxation, and the defendant argued before the Taxing Master that the two causes of action were to be treated as distinct for the purposes of taxation, and that as the plaintiff had recovered on each cause of action a sum not exceeding £5, and as the parties resided within the same civil-bill jurisdiction within which the cause of action had arisen, the plaintiff was not entitled to any costs under rule 4 of Order 65. The Taxing Master overruled the objection, and has taxed the plaintiff's costs as on the basis of a judgment for £10 recovered in an action for a wrong or injury disconnected with contract. From this decision the defendant has appealed in the present motion.

Order 65, on which this case turns, is practically identical with sect. 97 of the Common Law Procedure Act, 1856. It is necessary to see what the intention of that section was. In my opinion it was intended for the protection of the defendant, thereby to prevent a cause of action being tried in the High Court which could have been tried with more propriety in the Civil Bill Court of the county in which the parties resided and in which the cause of action arose. The plaintiff in any such action, if brought in the High Court, was to be deprived of his costs. The test of whether such action could have been more appropriately tried in the Civil Bill Court than in the High Court was to be the amount recovered at the trial of the action, namely, in cases of contract a sum less than £20, and in cases of tort, such as are included in the present action, a sum not exceeding £5.

Even this was not the final test, because where the tribunal which tried the case gave a sum within the respective limits above fixed, the judge at the trial might certify in the prescribed form that it was, nevertheless, a fit case for the Superior Court, which certificate would entitle the plaintiff to his costs. No certificate was given in the present case.

Applying the test, therefore, of the finding of the jury as to the amount recovered so far as the costs are concerned, the plaintiff has failed in his cause of action for assault, and he has also failed in his cause of action for false arrest; and if he had brought a separate action for each of these causes of action, he would have been entitled to no costs in either. That they are separate causes

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of action I think admits of no doubt. The Chief Justice left separate questions on each to the jury, and took separate findings of damages. The plaintiff in his proceedings elected to make these torts separate causes of action, and no successful objection (if any) was made on his behalf to the two causes of action being separately left to the jury for a double finding on damages. If, as suggested at the Bar, the assault and the false arrest were so much part of the same transaction that the amounts recovered separately should be aggregated for this reason, the plaintiff should have sued on the false arrest only, and offered in evidence the assaults as part of the circumstances in which the arrest was made in aggravation of damages on the one cause of action. The jury evidently would have given him £10, and the present question could not have arisen; but, as he was entitled to do, he elected to take his chance on the two causes of action, and must take the consequences, whatever they may be. Under the Common Law Procedure Act of 1853, sect. 54, the law and practice as to joinder of causes of action in the same summons and plaint, which existed with limitations before, was widely extended. At the same time, Whiteside C.J. in *Leonard* v. *Brownrigg* (1), at p. 166, says:—"I think that section was never intended to interfere with the question of costs. Its true meaning and principle is shown in the case of *Blackmore* v. *Higgs* (2), where an endeavour was made to escape the jurisdiction of the County Courts." Turning to the rule here (which is practically sect. 97), I think this is clear, that "action" as used must mean a proceeding with one cause of action, because the jurisdiction of the County Court is ascertained as of that in which "the cause of action," not "causes of action," has arisen. Further, the action in tort contemplated by the rule is an action "for any wrong or injury," &c., not for wrongs or injuries; and the rule makes no provision in terms for actions in which the causes of action may be as to some in contract and as to others in tort. If I felt myself at liberty to construe the rule for the first time, I should be inclined to hold that each action for the purposes of costs must be treated as having the one cause of action, and that, therefore, each cause of action permitted by the joinder section must be treated as the action under the

(1) I. R. 6 C. L., at p. 166. (2) 15 C. B. (N. S.) 790.

meaning of the rule; and if in the present action it appeared that while the assault took place in county Dublin, where the parties reside in the same civil-bill jurisdiction, and the false arrest, say, the following day, in Meath, the plaintiff, who recovered an insufficient sum on the assault to carry costs under this rule, could not be deprived of his one-half of the ordinary costs of the action in respect of the cause of action for the false arrest arising in county Meath, which goes to show that each cause of action must be treated as a separate and distinct entity, when it is a question of costs under these rules.

However, with the passing of the Common Law Procedure Act a universal practice sprang up of joining causes of action in the same proceedings, causes of action on different contracts, in contract and in tort, and, as in the present case, on different torts; and it would seem to me that, whether he is right in law or not, Mr. Moloney in his most able and cogent argument is perfectly logical when he says that for purposes of costs these different causes of action, though joined in the same proceeding, must be judged on their respective merits, and (in the absence of a certificate) tested by the amounts awarded in each, as though they were separate actions.

Having argued that they are thus separate actions, he says that, per se, that prevents the aggregation of the several amounts recovered in each so as to swell the total into an amount entitling the plaintiff in the proceedings to recover his costs. In my opinion, notwithstanding the judgment of Hayes J. in *Devine's Case* (1), it is difficult to reconcile a contrary intention with the object of the rule, which was to protect a defendant from "petty" litigation in the High Court, if a plaintiff on two causes of action which when tested by the result of the trial are found to be each of them "petty," can by any method of combination procure the result that he had an action in respect of both or either of them fit to be tried in the Superior Court. In *Myers* v. *Phelan* (2) O'Brien C.J. summarizes the facts there, and proceeds:—"The question we have to decide is whether the plaintiff . . . can on this question of costs convert a defeat as to costs as to two causes of action and a complete rout as to costs as to another cause of action into a

(1) 17 I. C. L. R. 174. (2) 26 L. R. Ir., at p. 229.

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complete victory, so as to get the general costs of the action. This process of producing victory has been hitherto unknown in any species of contention, except that of law."

Broadly speaking, there are two contentions in this field of law and practice:—the first, following Lord FitzGerald, then FitzGerald J., in *Devine* v. *London and North-Western Railway* (1) (a judgment expressly approved of and adopted in *Myers* v. *Phelan* (2) by Ashbourne C.) "that there are two actions, and they are not the less to be considered two actions because they are comprised in the same writ of summons and plaint"; the second and alternative principle for which the plaintiff here contends is expressed by Pigot C.B. in *Arkins* v. *Armstrong* (3), "that several counts in contract joined in the same summons and plaint are not several actions of contract, but are several counts in an action of contract."

Most of the cases cited to us turned on the element of money paid to the plaintiff or into Court, and how far it was to be regarded as money recovered in the action; but when I find the first proposition apparently supported by the reasoning of Erle C.J. in *Blackmore* v. *Higgs* (4), by Lefroy C.J. and Fitzgerald J. in *Devine's Case* (1), by Whiteside C.J. on behalf of himself, O'Brien J., and FitzGerald J. in *Leonard* v. *Browning* (5), and by Ashbourne C. and O'Brien C.J. in *Myers* v. *Phelan* (2), and presumably supported by Palles C.B. (6);—and when I find the second proposition supported by O'Brien and Hayes JJ. in *Devine's Case* (1), by Pigot C.B. in *Arkins* v. *Armstrong* (3) on behalf of the Exchequer Division (not stating how many judges concurred), and by Porter M.R. and Barry L.J. in *Myers* v. *Phelan* (2), leaving FitzGibbon L.J. dubitante,—it is impossible to arrive at any result satisfactory to oneself.

It will be noted that O'Brien J. was a supporter of the second in *Devine's Case* (1), and of the first in *Leonard* v. *Browning* (5) subsequently, and that the decision of Pigot C.B. in *Arkins' Case* (3) was reversed in *Myers* v. *Phelan* (2), though not necessarily on the ground that there was but one action with separate counts.

(1) 17 I. C. L. R. 174.
(2) 26 L. R. Ir. 218.
(3) I. R. 3 C. L. 373.
(4) 15 C. B. (N. S.) 790.
(5) I. R. 6 C. L. 161.
(6) 26 L. R. Ir., at p. 229.

If the basic reason why damages in tort cannot be added to sums recovered in contract for the purposes of this rule, as admitted at the Bar, is that the difference in their nature involves the fact that they must be separate causes of action, then I cannot see why this reason should not apply to torts inter se once it appears they are distinct causes of action from each other. And Pigot C.B. in *Walsh* v. *Walsh* (1), as explained in *Arkins* v. *Armstrong* (2), at page 382, says distinctly that if the defendant had paid £5 into Court on one count in tort, and the plaintiff taking the money out of Court had recovered £1 on another count in tort, the question would still be open whether the plaintiff had recovered more than £5 in an action of tort, and that nothing was said in *Walsh* v. *Walsh* (1) to prejudge that question. Now *Walsh* v. *Walsh* (1) was an action with two causes of action in tort.

In *Hughes* v. *Guinness* (3) the subject-matter of the action was a single contract. In *Quin* v. *M'Kinley* (4) Barton J. expressly limits his judgment in that case to a case where the money paid was paid to the plaintiff in respect of a single liquidated amount, and declines to say what might be done in other cases. *Myers* v. *Phelan* (5) we have discussed fully. The express point before us has never been finally decided on a net issue. I have only ventured to express my own views because this is the present position. But, having regard to the statements made by two of the Lords Justices in the last case in the final Court here, I consider that I should follow their view out of respect for them. FitzGibbon L.J., at page 248, refers to "the authorities which treat any number of debts or torts as cumulative, and hold that where there is an aggregate result in favour of the plaintiff which exceeds the statutory limit he is entitled to costs." Further, Barry L.J. says, page 255: "... It is not disputed that if there are two actions for tort, and the plaintiff recovers £3 in one and £3 in the other, he gets no costs, but that if the plaintiff combines the two actions by bringing one action with two counts, and recovers £3 on each count, he is entitled to full costs." And in this connexion I

(1) 17 I. C. L. R. 195.
(2) I. R. 3 C. L. 373.
(3) 4 I. C. L. R. 314.
(4) [1902] 2 I. R. 315 at p. 327.
(5) 26 L. R. Ir. 218.

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may further point out (as I suggested during the argument) that if the Court did not assume that damages on different causes of action in tort could be added together, it would have been quite futile for the Court of Appeal to have taken so much time and trouble in *Myers* v. *Phelan* (1) to decide whether the £5 paid into Court was money recovered by the plaintiff, who only desired such a decision for the express purpose of adding the £5 to the £2, the damages on the other two causes of action in tort, so as to entitle him to the costs of the action.

None of the cases referred to by FitzGibbon L.J. as cumulative causes of action in debt or in tort has been cited to us. The Taxing Master says there is no definite practice in his office which rules a case like the present. And when I find two judges so distinguished as FitzGibbon and Barry L.JJ. assuming (though without argument) that aggregation of separate causes of action when included in the same proceedings is permissible, I think we, as a Court of subordinate jurisdiction, should follow their dicta, and leave the Court of which they were members to alter or declare the practice and principle so laid down. For these reasons I concur in the result of the judgment just pronounced by Pim J.

A. E. C.

June 13.

The defendant appealed to the Court of Appeal (2). The Court, without calling on the respondent, affirmed the decision of the King's Bench Division.

C. L.

Solicitor for the plaintiff: *Christopher Friery.*
Solicitor for the defendants: *Edward White.*

(1) 26 L. R. Ir. 218.

(2) In the Court of Appeal, before O'CONNOR M.R., and RONAN and MOLONY L.JJ.

WILLIAM SHEANE, APPLICANT; COUNTY COUNCIL OF WICKLOW, RESPONDENTS (1).

Appeal.
1918.
June 25, 26.
Dec. 20.

Malicious injury—Hire-purchase agreement—Lease of Chattel.—"Belonging to" and "person so injured"—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 135; *Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5.

A traction engine in the possession of a person, called the tenant, under a hire-purchase agreement, was maliciously injured. Under the terms of the agreement the tenant was to keep the engine in good and substantial repair, and upon payment of all rents due it was to become his property; but subject to this provision it was to remain the sole property of the company from which it was hired. The tenant applied for compensation for malicious injury.

Held, that a lease of a chattel can validly be made; that under the terms of the agreement the applicant was a lessee of the engine; and that being such lessee the engine "belonged" to the applicant within the meaning of sect. 135 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), and that he was entitled to claim and recover compensation as a person injured.

CASE STATED for the Court of Appeal by Sir James H. Campbell C.J. as Judge of Assize in county Wicklow, at the Spring Assize, 1918, on the hearing of an appeal from the County Court Judge under the Local Government (Ireland) Act, 1898, sect. 5.

The County Court Judge awarded the applicant £537 as compensation for malicious injury to a road locomotive traction engine and a general traction engine. The County Council appealed to the County Court Judge, and on the hearing of the appeal the Lord Chief Justice decided in their favour as regards the claim in respect of the general traction engine, and was not asked for liberty to appeal in respect of it. He also decided in favour of the respondents in respect of the road locomotive traction engine, being of opinion that the applicant had not such ownership in the engine as to entitle him to claim in his own name as a person injured within the meaning of sect. 135 of the Grand Jury (Ireland) Act, 1836; but, at the request of the applicant's counsel, gave liberty to appeal. He estimated the injury to this

(1) Before O'CONNOR M.R., and RONAN and MOLONY L.JJ.

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machine at £344, and should the Court of Appeal be of opinion that the applicant was entitled to make this claim, the decree of the County Court Judge should be varied by reducing it to this amount.

The applicant at the time of the injuries complained of was in possession of this particular engine under a hire-purchase agreement (1) for four years between Burrell's Hiring Company, Limited, of the one part and the applicant of the other part; and two years of the period had then still to run. The agreement provided that "the tenant shall during the continuance of said term pay to the company the several rents set forth in the schedule hereto on the days herein respectively mentioned"; that if default was made in payment of any of the rents, interest at the rate of 6 per cent. should be paid until payment; that the tenant should take "proper care" of the engine, and "keep the same in good and substantial repair, working order, and condition." The plates attached to the engine inscribed "Burrell's Hiring Company, Ltd., Owners," were to remain attached thereto "for the purpose of making the ownership publicly known, and such plates shall not be removed or defaced by the tenant. If any such plates shall be injured or defaced, the tenant shall within three days restore the same to its former condition." The tenant was to keep the engine insured against fire in the name of the company, and any moneys received under the policy were to be applied in replacing or restoring the engine. In case the tenant allowed a receiving order to be made against him or took the benefit of any Act for the relief of insolvent debtors, or made any assignment for the benefit of his creditors, or if any distress or execution was levied against him, or if the rents were in arrear or any breach of the provisions of the agreement was committed, the term immediately thereupon ceased and determined. Upon the payment of the last of the rents the engine was according to clause 17 to "become the property of the tenant," but subject to this provision, the agreement provided that it "shall be and remain the sole property of the company."

The question of law in respect of which liberty to appeal was given and this case was stated was whether the applicant was in the circumstances a person injured.

(1) See note at end of this report.

Battersby K.C. and *C. Campbell*, for the appellant:—

The obvious meaning of sect. 135 of the Grand Jury Act, 1836, is that the person in possession of the property maliciously injured is entitled to compensation. The words "person or persons so injured," that is by the malicious act, dominate the words "belonging to." In pari materia with sect. 135 are the Malicious Injuries (Ireland) Act, 1848 (11 & 12 Vict. c. 69), sect. 2; the Malicious Injuries (Ireland) Act, 1853 (16 & 17 Vict. c. 38), sect. 1; and in each of these statutes the phrase is "damages sustained by any person or persons." Throughout the Malicious Injuries Code the word "owner" does not occur. The words "belonging to" do not connote legal ownership in the technical sense. "Property" is the generic term for all that a person has dominion over: Stroud; and in this case the applicant had dominion over the engine. Under the agreement he was lessee of the chattel; and he was bound to make good any damage to it. Compensation has been allowed to a tenant from year to year, with a covenant to repair, of premises maliciously injured: *In re Ryan's Presentment* (1); and in *In re Leslie's Presentment* (2) compensation was allowed to a railway company for the malicious burning of goods which were in a wagon in a goods shed of the company.

[Other authorities cited: — *Corken* v. *County Council of Antrim* (3); *Smith* v. *Tyrone County Council* (4); *Farnham* v. *Cavan County Council* (5); *The Winkfield* (6).]

S. L. Brown K.C. and *J. O'Byrne*, for the respondents:—

Under sects. 135 and 137 of the Grand Jury (Ireland) Act, 1836, the owner of the property injured is the person who has a right to compensation. It was so decided in *Commercial Plate Glass Co., Ltd.*, v. *the Lord Mayor, &c., of Belfast* (7), where Andrews J. laid down that "the only person contemplated or qualified to make a claim for compensation for malicious injury to property is the owner of that property which has been so

(1) 31 I. L. T. 366.
(2) 31 I. L. T. 215.
(3) 41 I. L. T. R. 131.
(4) [1909] 2 I. R. 674.
(5) 47 I. L. T. R. 98.
(6) [1902] P. 42.
(7) 27 I. L. T. R. 116.

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injured." Under the agreement in this case the applicant is not the owner of the engine; he is merely a bailee. We admit that there can be a lease of a chattel; but although the agreement here may be described as a lease, it is subject to certain conditions, one being that the hirer was to have no property in the engine until all the instalments or rents were paid. The name-plate clause and clause 17 show that the engine was still to remain the property of the company. The governing words of sect. 135 are "belonging to any person"; and the words "the person or persons so injured" must refer to the owner or owners of the damaged property.

Cur. adv. vult.

Dec. 20.

O'CONNOR M.R.:—

This is an appeal from the judgment of Campbell C.J. as Judge of Assize at Wicklow, whereby he dismissed a claim by the applicant for compensation for a malicious injury done to a road locomotive traction engine. The sole ground of the dismissal of the claim was that the applicant had not such ownership in the engine as entitled him to claim in his own name as a person injured within the meaning of sect. 135 of the Grand Jury (Ireland) Act, 1836, as adapted for the purposes of the Local Government Act, 1898, by the Local Government (Adaptation of Irish Enactments) Order, 1899. The facts are set out in a case stated by the Chief Justice, and are shortly as follows:—The applicant at the time of the injuries complained of was in possession of the engine under a hire-purchase agreement, dated 19th July, 1915, made between Burrell's Hiring Company, Ltd. (the hirers), of the one part, and William Sheane (the applicant) of the other part. In this agreement the applicant is all through described as "the tenant." The first clause contains a letting on hire to the tenant for a term of four years. The consideration for the letting on hire is expressed to be the payment of £223 on the signing of the agreement and eight future half-yearly payments of £94 5*s.* each. There is an agreement by the tenant to keep the engine in good and substantial repair, working order, and condition. There is a clause providing that a plate attached to the engine with the words "Burrell's Hiring Company, Ltd., owners," should remain attached thereto for the purpose of making

the ownership publicly known. The tenant was bound to keep the engine insured against fire in the name of the company, and any moneys received under the insurance were to be applied in replacing or restoring the property. The company was given a power of inspection. The tenant was not to assign or sublet the agreement without the consent of the company. There is a clause of forfeiture in certain events, viz., a receiving order made against the tenant on his taking the benefit of any Act for the relief of insolvent debtors, an assignment for the benefit of his creditors, a distress or execution on the tenant, failure to pay the rents reserved, the breach of any of the provisions in the agreement.

There is also this important clause:—"Upon payment by the tenant of the last of the rents hereby reserved and of all other sums, if any, which may be due to the company from the tenant under the agreement, the scheduled articles shall become the property of the tenant, but, subject to this provision, the scheduled articles shall be and remain the sole property of the company." These are the main and only provisions of the agreement which require consideration.

Now, what was the right of the tenant under this agreement? He was entitled to exclusive possession of the engine, and had the exclusive right of working it. The company could not have deprived him of possession so long as the agreement was performed by him. If the company took the engine from him, they could be sued in trover or for trespass. He had, then, certain rights attaching to ownership. No doubt, he could not alienate without consent, but that prohibition did not destroy his ownership any more than a clause against alienation in a lease of lands prevents the tenant from being the owner in possession of the lands.

Let me now consider what were the rights of the company. They were to be known to the world as the owners. That was provided for by the maintenance of a plate on which their name was inscribed as owners; and the agreement provided that the engine should be and remain the sole property of the company. But that did not mean that they could take possession of the engine or that they could dispose of it. Its only object and legal meaning was, that in the event of the company becoming entitled to resume possession of the engine in consequence of some breach

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of the agreement, it should not be in the reputed ownership of the tenant so as to make it available for his creditors. This being the legal situation, the question arises—Was the tenant a person entitled to make a claim under the 135th section of the Grand Jury Act for a malicious injury to the engine? Under this section, the thing injured must be a thing belonging to the person making the claim for compensation. Did the engine belong to the claimant in this case? "Belong" is not a term of art. It connotes the right to possession—the right of user and enjoyment—substantial interest rather than technical or legal ownership. It indicates a present right to exclusive dominion rather than a contingent right to resume possession arising out of a claim of forfeiture. Until the forfeiture accrues, the chattel does not "belong" to the person entitled to exercise the right. Indeed, forfeiture involves the determination of an estate belonging to one person, and the taking of it by another. For this reason I am of opinion that the claimant in the present case not having incurred a forfeiture was a person to whom the property belonged, and as such was a person injured and entitled to sustain the claim.

There is this further consideration. He is the person who really sustained the damage. He was bound by the agreement to keep the chattel in good order and repair, and is under a liability to restore it to its original condition. The good sense of the case is to hold that he was the proper claimant, and in my opinion we should so decide.

MOLONY C.J. :—

By agreement, dated 19th July, 1915, and made between the Burrell's Hiring Company, Ltd., of the one part, and William Sheane of the other part, it was agreed that the company should let on hire, and that William Sheane (therein called "the tenant") should hire for a term of four years from the 30th July, 1915, an eight-horse-power traction engine and threshing machine. Under the terms of the letting the tenant agreed to pay the sum of £223 on the signing of the agreement, and to make eight subsequent payments of £94 5*s*. on the 30th January and 30th July in each year up to and ending the 30th July, 1919. The payment of the rent was to be secured by promissory notes accepted and signed by the tenant,

and in default of the payment of any of the rents the tenant agreed to pay interest at 6 per cent. on the rent in respect of which default was made. It was further provided that the tenant should keep the articles in good and substantial repair, working order, and condition; and there was also a provision that on receipt of ten days' notice he should make good any want of repair or injury to the satisfaction of the company, and the tenant was not to assign or otherwise part with possession of the articles. And it was further provided that upon payment by the tenant of the last of the rents thereby reserved and of all other sums of money which might be due from him to the company, the articles were to become the property of the tenant, but that, subject to this provision, the articles were to remain the sole property of the company. The tenant entered into possession of the articles named in the agreement, and in 1917 the engine was maliciously injured to the extent of £344. Sheane applied for compensation under the provisions of sect. 135 of the Grand Jury Act, 1836, and he was declared entitled to it by the County Court Judge; but Sir James Campbell, the Lord Chief Justice, reversed the order of the County Court Judge, and decided in favour of the county council on the ground that the applicant had not such ownership in the engine as entitled him to claim in his own name as a person injured within the meaning of the section. The section enables an application to be made for compensation where property is maliciously injured or destroyed "belonging to any person"; and the Court may either refuse such application altogether or make a decree for such sum or sums of money "as the person or persons so injured" ought to receive for such injury or damage. It is, therefore, necessary that the applicant should be a person injured, and that the property should be belonging to him within the meaning of the section. The word "belonging" has two meanings—(*a*) ownership and (*b*) the absolute right of user. In *The Attorney-General* v. *The Oxford, Worcester, and Wolverhampton Railway Company* (1) a claim was made for railway duty, and it was resisted on the ground that they were not the owners of the line in question, but only had exclusive running powers over it; and Martin B. said (at p. 865):—"They have an absolute right

(1) 7 H. & N. 840.

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to use it. They do use it in exercise of their right, and no one can lawfully prevent them. If the word 'belonging' is to be construed in the sense of their being the owners of the soil, it does not belong to them; but if 'belonging' is to be construed in the popular sense of having the absolute right to use it in the only way in which a railway can be used, viz., by running trains over it, it is not a very strained use of the word 'belonging' to say that the line belongs to them. A road may be said with perfect propriety to belong to a man who has the right to use it as of right although the soil does not belong to him."

In the present case there is an absolute right in the tenant to use the engine to the exclusion of the company and everybody else; and it does not, I think, unduly strain the language of the section to say that the engine did belong to the applicant. It has been argued on behalf of the County Council that all the tenant had was a mere licence to use the engine, and that he had no legal property in it. It was urged in support of this view that clause 14 enabled the tenant to terminate the hiring during the said term, and that consequently, as there was no legal obligation on the part of the tenant to buy, he was to be regarded as not being in possession under the agreement to purchase, but only under a contract of hiring, and *Helby* v. *Matthews* (1) was relied on. It seems to me, however, that even though the agreement is to be regarded as an agreement for hiring within *Helby* v. *Matthews* (1), the applicant would still be entitled to recover compensation as a person injured.

It has been held in quite a number of cases under the section that its benefits are not confined to a person who has absolute ownership in the goods. In *In re Ryan's Presentment* (2) Palles C.B. held that compensation could be allowed to a tenant in respect of the malicious destruction of premises which he held as tenant from year to year with a covenant to repair, and in *In re Lesue's Presentment* (3) compensation was allowed by O'Brien J. to a railway company in respect of goods which were in a wagon which was maliciously burned in a goods shed of the company, notwithstanding the contention that it was the consignees and not the company who were the owners of the goods within the meaning of the section.

(1) [1895] App. Cases, 471. (2) 31 I. L. T. 366. (3) 31 I. L. T. 215.

In the present case there was a demise of the engine for a fixed period with a covenant to keep it in good and substantial repair, working order, and condition. If the thing demised was a house there could be no question but that in the circumstances the applicant would be entitled to recover; and it does not seem to me to make any difference that the thing demised was an engine instead of a house. There is no doubt but that there can be a lease of chattels. (See Bacon's Abridgment, vol. iv, page 638; Platt on Leases, vol. i, page 26; and Foa, Landlord and Tenant, page 18.) The question as to who is to be regarded as owner of chattels which have been demised for a term has been considered in many cases, and I think the closest analogy to the present case will be found in the case of charter-parties. In *The Master, Wardens, and Assistants of Trinity House* v. *Clark* (1) the plaintiffs sued for tolls and duties in respect of a certain vessel, and it was contended on the part of the defendant that he was not to be considered as owner, because he had chartered his ship to the Crown for transport service. The Court agreed with this contention, and Lord Ellenborough said (page 297):—"No mischief that we can foresee will ensue from holding that the Crown has a right, under this charter-party, to have the temporary possession of this vessel, which must materially assist in securing the performance of the service contracted for, if the parties or their servants should be unwilling, from any cause, to comply with the contract. We do no violence to the words of the instrument by putting this construction upon it. The terms are proper terms of grant and demise; the sum to be paid is in the nature of rent for the use of a chattel; the whole use of the ship is warranted; the term is sufficiently fixed, and the certificates which the parties are to procure to entitle them to the rent are worded so as to recognize the possession." The cases of *Meiklereed* v. *West* (2) and *Sir John Jackson, Ltd.* v. *The Owners of the Steamship Blanche* (3) are strong authorities to the same effect. I think that these cases are even stronger than the present.

On the whole case I have come to the clear conclusion that the engine in the present case may be considered as belonging to the applicant within the meaning of the section, and that as a person injured he is entitled to compensation.

(1) 4 M. & S. 288. (2) 1 Q. B. D. 428. (3) [1908] App. Cases, 126.

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RONAN L.J. :—

Sect. 135 applies to real and personal property of certain descriptions "belonging to any person." Sect. 3 provides that the singular shall include the plural. Sect. 5, sub-s. 1, of the Local Government (Ireland) Act extends sect. 135 of the Grand Jury Act to property of any description, whether real or personal. There is no distinction in the Acts between their application to real and to personal property, nor any reference to the title thereto, nor to the extent of interest therein entitling a person to claim.

The relevant parts of sect. 135 may be stated thus:—In the case of malicious injury to property "any person or persons injured by any such offence" shall take certain steps, including an application for compensation, "and the grand jury shall . . . examine into the matter . . . and shall . . . either disallow such application altogether or present such sum or sums of money as the person or persons so injured ought to receive for such injury." The frame of the section is remarkable. "In all cases" of malicious injury to property "belonging to any person" . . . any person or persons injured by any such offence (not the person to whom such property belongs) may apply, &c. The only condition in the section is that the applicant is a person injured by the offence. This is the section creating the jurisdiction and giving the right to compensation. The adaptation does not seem to affect the provisions of the section I have referred to. However, sect. 137 (a procedure section) provides "that every person or persons who shall . . . apply for compensation for any loss or damage occasioned by malicious injury as aforesaid shall . . . give in his, her, or their examination upon oath, or that examination upon oath shall be given by his, her, or their servant or servants who had the care of his, her, or their property so injured."

Does this section cut down, and if so, how far, the express provision in sect. 135: "any person or persons injured by any such offence" may apply, &c.? It provides, 1, that the person applying may hand in his own examination. What is he to state? Whether he knows the person who committed the injury;

2, that where his property has been injured he may in lieu thereof hand in the examination of the servant who had the care of it, stating the same thing. In my opinion, though one of the alternatives must be performed, there is nothing to cut down the general right to compensation given by sect. 135.

Assuming that under sect. 135 the only person who can apply is the person whose property is injured, what does this mean? Does it mean the absolute owner in possession of personalty and the owner in fee in possession of buildings? Both buildings and chattels can be the subject of leases. Is a lessee for 999 years at a nominal rent in consideration of a fine entitled to apply, or is it the owner of the reversion in fee? Which is the person so injured? If the building is charged beyond its value with an annuity, is it the owner in fee or the annuitant that is injured? I think it is settled by the cases that even a tenant from year to year can apply where he is bound to repair. Can a landlord entitled to houses let to weekly tenants recover? He has only the reversion.

A valuable house is burned down. 1. *A* is tenant for life; *B*, tenant in fee in remainder. 2. *A* is tenant in fee; *B* a lessee for 100 years at a substantial rent. 3. *A* and *B* are tenants in common in equal shares. I do not think it can be seriously contended that both *A* and *B* could not claim either jointly or severally in these cases. In the case of real property, it cannot be contended that the only possible claimant must be the absolute owner of the entire fee-simple.

Let us assume for a moment that the present document dealt with a house or factory. Every clause would apply except No. 7. Can there be the least doubt that in such a case "the tenant" could claim? It would be a lease simply, apart from clause 17. Would clause 17 prevent its operation as a lease? Surely the plain effect of that clause would not be to prevent the term coming into operation. Its plain intention would be to confer the fee on the tenant on performance of the conditions, but to provide that, until such performance, the fee subject to the term should remain the sole property of the company.

I have already pointed out that real and personal property are dealt with together, and no distinction is taken. Now in the case

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of personal property, if *A* and *B* were entitled to the chattel in equal shares, there can, I think, be no doubt that both or either could claim. It cannot be contended that the claimant must be the sole absolute owner of the chattel any more than that he should be sole owner in fee in possession of real estate.

There is no doubt that the law has always been that there can be a lease of a chattel. See the authorities mentioned in Bacon's Abridgment, vol. iv, pp. 638–9; Platt on Leases, vol. i, p. 26. See in particular the passage from Bro. Leases, cited at p. 268 of Sheppard's Touchstone. Questions as to leases of chattels have mostly arisen in cases of charter-parties; in each case it was held to be a question of construction whether the charter was a mere hiring of the use of the ship. The cases will be found under Article 2 of Lord Justice Scrutton's work on Charter-parties, and in vol. xxvi of Halsbury, pp. 85–86. There is, however, no difference in principle between a lease of a ship and a lease of any other chattel. Lord Ellenborough, in the case of *The Master of Trinity House* v. *Clark* (1), says, there is no difference between the lease of a ship and a lease of a wagon and team. *In Hall* v. *Picard* (2)—a case where the plaintiff sued for injury to his horses, which at the time were let to a third party for hire—the same judge said: "This is in the nature of an injury to the plaintiff's reversion. . . . This is not like a gratuitous permission to use a chattel as in *Lotan* v. *Cross* (3), where the possession constructively remained in the owner. The horses were let to hire for a certain term to Dr. Carey, who had a right to retain them till that was expired." So, in *Mears* v. *London and South-Western Railway Company* (4), where a barge was out on hire for an unexpired term, Williams J., at p. 854, says: "It is true that the barge at the time was let out to Scott Russell for an unexpired term. But, subject to Scott Russell's temporary interest in it, the barge still remained the property of the plaintiff." In *Sir John Jackson* v. *Owners of Steamship Blanche* (5), there was a charter which amounted to a demise. The question was, whether the charterer (the lessee) was the owner, within sects. 503 and 504 of the Merchant Shipping Act, 1894. The House of Lords held that he was. At p. 136,

(1) 4 M. & S. 288, at p. 299.
(2) 3 Camp. 187.
(3) 2 Camp. 464.
(4) 11 C. B. N. S. 850.
(5) [1908] A. C. 126.

Lord Atkinson describes the lessee as "a person with the special and temporary ownership possessed by a charterer by demise," and contrasts him with the actual "fee-simple owner."

It must be remembered that a tenant for 999 years has neither the fee nor the seisin of the lands; he is liable for rent on the covenants and conditions, and impeachable for waste unless exempted. In fact, he has a limited and special property and right to possession of the thing demised. How does the case of a chattel demised differ? Clause 17 really gives the tenant a far greater interest than he would have had without it. It is not intended to affect the special property and right to possession given by the term. It is simply intended to provide that the tenant shall only have those rights until "the last of the rents" shall have been paid, and to prevent its being held that what Lord Atkinson calls "fee-simple" passed on the execution of the document. If clause 17 was not in the document, could there be any doubt that the document was a lease with covenant to repair, to insure, a covenant not to assign, sublet, or part with the possession, and a clause of surrender, and references to the term "hereby created"? Clause 17 gives the tenant a further interest in the article demised of a most substantial kind. The meaning of the final words of clause 17 is simply that until all the rents shall have been paid his only interest in the property shall be that created by the term; that the absolute property shall not pass until then.

There seems to be very little authority on the injury which will entitle a person to sue. In *Smith* v. *Tyrone County Council* (1), a case of a mortgagee not in possession, the Court gave no opinion on the question. The case cited for the county council, the *Plate Glass Case* (2), only decided that an insurance company who had insured the glass could not recover. They could not have brought an action against the person who broke the glass. O'Brien J.'s decision in *In re Leslie's Presentment* (3) goes much further than the present case. Even if the document in the present case was not a lease, but merely a statement of the terms of a bailment completed by delivery, I should be of opinion that the applicant could recover.

(1) [1909] 2 I. R. 674. (2) 27 I. L. T. R. 116.
(3) 31 I. L. T. 215.

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The measure of compensation, of course, depends on the injury sustained, and this will always partly depend on the interest of the claimant in the property injured.

Solicitor for the appellant: *F. Kennedy.*

Solicitor for the respondents: *J. H. M'Carroll.*

C. L.

AGREEMENT INCORPORATED IN CASE STATED.

An agreement made the 19th day of July, 1915, between Burrell's Hiring Company, Limited, whose registered office is at St. Nicholas' Works, Thetford (hereinafter called "the company"), of the one part, and William Sheane, thrashing contractor, Rockmount, Ovoca, County Wicklow (hereinafter called "the tenant"), of the other part, whereby it is agreed as follows:—

1. The company will let on hire and the tenant will hire for the term of four years from the 30th day of July, 1915, the machinery, articles, and effects enumerated in the schedule hereto [not printed] (hereinafter called "the scheduled articles") [including the traction engine in question].

2. The tenant shall during the continuance of said term pay to the company the several rents set forth in the schedule hereto on the days therein respectively mentioned.

3. The payment of the said rents respectively shall be secured by the delivery to the company from time to time at the request of the company of bills of exchange or promissory notes accepted or signed by the tenant. Provided that the tenant shall not be required to deliver to the company bills of exchange or promissory notes to secure the last payment of rent payable under this agreement.

4. If default is made in payment of any of the said rents, the tenant shall pay to the company interest on the rents in respect of which default is made at the rate of 6 per cent. per annum, from the several days when such rents became due until payment.

5. The tenant shall take proper care of the scheduled articles, and keep the same in good and substantial repair, working order, and condition.

6. The plates attached to the scheduled articles, inscribed with the words "Burrell's Hiring Company, Ltd., owners," shall remain attached thereto for the purpose of making the ownership publicly known, and such plates shall not be removed or defaced by the tenant. If any such plate shall be injured or defaced, the tenant shall within three days restore the same to its former condition.

7. If the scheduled articles or any of them are removed, the tenant will within twenty-four hours give to the company the address of the place to which the same are removed.

8. The tenant shall during the said term keep the scheduled articles insured against fire in the several sums set opposite thereto respectively in the

schedule. Such insurance shall be effected, in the name of the company, in some offices approved in writing by the company. The policy of insurance and the receipts for the premiums paid thereunder shall be delivered to the company. If the tenant make default in effecting or keeping up such insurance, the company may effect and keep on foot the same; and the tenant shall repay to the company all moneys paid by the company for such insurance, with interest thereon at the rate of 6 per cent. per annum until payment. Any moneys received under any policy effected under this agreement shall be applied in replacing or restoring the articles in respect of which the same were paid, but subject to the right of the company thereout, in the first place, to retain any sum which may be due from the tenant to the company under this agreement.

9. The company shall at all times by its officers and agents have access to the scheduled articles to inspect the condition thereof.

10. The tenant will within ten days after notice in writing from the company of any want of repair or injury in or to the scheduled articles or any of them, make good every such want of repair or injury to the satisfaction of the company.

11. The tenant shall upon demand by the company or any person authorized by the company produce the last receipt for the rent of the premises where the scheduled articles or any of them may be.

12. The tenant shall not assign this agreement or sublet or part with the possession of the scheduled articles, or any of them, without the consent in writing of the company.

13. Upon the happening of any of the following events (that is to say)—

(*a*) If a receiving order is made against the tenant, or he takes the benefit of any Act for the relief of insolvent debtors;

(*b*) If the tenant makes any assignment for the benefit of or compounds with his creditors;

(*c*) If any distress or execution is levied or sued out against the tenant;

(*d*) If any rents payable under this agreement are in arrear for twelve days after they respectively become due whether demanded or not;

(*e*) If the tenant commit any breach of any of the provisions herein contained—

the company may, without further notice or demand, enter upon the premises where the scheduled articles may be, and take possession of and remove the same, and the term hereby created shall immediately thereupon cease and determine.

14. The tenant may, but wholly without prejudice to any rights which shall have accrued to the company under this agreement, at his own cost and expenses at any time during the said term, deliver up to the company or to their order the scheduled articles, and thereby terminate the said hiring, and upon such delivery the term hereby created shall immediately cease and determine.

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15. Notwithstanding any determination of the said hiring and term under either of the two last preceding clauses and the resumption by the company of the possession of the scheduled articles, the tenant shall remain liable to the company for all rents and other sums of money and interest which have become due to the company, including the apportioned rent down to the date of re-taking or delivering possession as the case may be, and shall also remain liable for all breaches by the tenant of the provisions of this agreement, prior to such re-taking or delivering possession. The tenant shall also pay to the company all expenses the company may incur in or about each entry, re-taking or delivering possession and removal.

16. If the company shall re-take possession of the scheduled articles or the tenant shall deliver up the same to the company under the provisions hereinbefore contained, the company shall re-deliver to the tenant any bills of exchange or promissory notes delivered to the company as security for rents accruing due after such re-taking or delivering possession, or if any of such bills of exchange or promissory notes have been discounted, shall indemnify the tenant against the same. Such discount shall in no way prejudice or affect the right of the company to re-take possession of the scheduled articles, under the power hereby conferred.

17. Upon payment by the tenant of the last of the rents hereby reserved, and of all other sums, if any, which may be due to the company from the tenant under this agreement, the scheduled articles shall become the property of the tenant, but subject to this provision the scheduled articles shall be and remain the sole property of the company.

18. If at any time any dispute, difference, or question shall arise between the tenant and the company touching the construction, meaning, or effect of these presents, or any clause or thing herein contained, or the rights or liabilities of the said parties respectively under these presents, or otherwise howsoever in relation to the premises, then every such dispute, difference, or question shall be referred to the arbitration of two persons, one to be appointed by each party to the reference, or an umpire to be appointed by the arbitrators in writing before commencing the business of the reference; and the decision or award of the said arbitrators or umpire shall be final and binding on the parties respectively; and this clause shall be deemed to be a submission to arbitration within the Arbitration Act, 1889, or any statutory modification or re-enactment thereof for the time being in force; and the cost of the reference and award shall be in the discretion of the arbitrators, arbitrator or umpire, who may direct to, and by whom, and in what manner the same or any part thereof shall be paid, and with power to tax or settle the amount of costs to be so paid or any part thereof, and to award costs to be paid as between solicitor and client; and this submission to reference and any award made in pursuance thereof may at the instance of either of the parties to the reference, and without any notice to the other of them, be made a rule or order of any division of the High Court of Justice.

19. All the powers and provisions herein contained shall be exercisable by and extended to the company or its assigns; and the expression "the tenant" shall include his executors, administrators, and assigns.

THE KING (AT THE PROSECUTION OF BENJAMIN ROMNEY) *v.* EDMUND LUPTON, ESQUIRE, ONE OF THE DIVISIONAL JUSTICES OF THE POLICE DISTRICT OF DUBLIN METROPOLIS, AND MAJOR G. S. BURTON (1).

K. B. Div. 1918. Oct. 28, 30. Nov. 12.

Army—Military Service—Absentee without leave—Order of magistrate handing accused over to military custody—Jurisdiction.

On the 14th September, 1918, R. was brought before one of the Divisional Justices of the Police District of Dublin Metropolis as a person suspected of being an absentee without leave from the Army Reserve. The magistrate having heard evidence made an Order that he should forthwith be delivered into military custody. On an application to make absolute a conditional order for a writ of certiorari and for Habeas Corpus:

Held, that the magistrate having found that the applicant was ordinarily resident in Great Britain, and an absentee without leave, had jurisdiction to convict summarily, and (subject to any punishment he might give) to direct the accused to be delivered into military custody under sect. 154, sub-s. 4, of the Army Act, 1881 (44 & 45 Vict. c. 58); or, without convicting, to direct the accused to be delivered into military custody, observing, however, the provisions of the Military Service Act, 1916, s. 1 (2), as explained in *The King* v. *Jones*, [1917] 2 I. R. 7.

CERTIORARI AND HABEAS CORPUS.

Motion to make absolute a conditional order for a writ of certiorari, directed to Edmund Lupton, one of the divisional justices of the police district of Dublin metropolis, to bring up for the purpose of being quashed the order and adjudications of the said divisional justice made at the Dublin Metropolitan Police Court on the 17th day of September, 1918, on the hearing of a complaint that one Benjamin Romney was a person suspected of being an absentee without leave from the Army Reserve, he being a person deemed by the Military Service Acts, 1916–18, to have been duly enlisted and forthwith transferred to the Reserve.

And for a writ of habeas corpus ad subjiciendum, directed to Major G. S. Burton, commanding him to have before the King's Bench Division, or a judge thereof, the said Benjamin Romney, with the day and cause of his being taken and detained to undergo all and singular such matters and things as the Court shall consider concerning him in this behalf.

(1) Before MOLONY C.J., and GIBSON and MADDEN JJ.

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The prosecutor, who alleged that he was a Russian subject, was arrested on the 14th September, 1918, as a person suspected of being an absentee without leave from the Army Reserve, he being a person deemed by the Military Service Acts, 1916–18, to have been duly enlisted and forthwith transferred to the Army Reserve, and brought before Mr. Edmund Lupton, police magistrate, Dublin metropolis, who, on the 17th September, 1918, made an order that he should forthwith be delivered into military custody (1).

The conditional order for certiorari to quash the magistrate's order was obtained on the following grounds:—That the order made by Mr. Lupton is neither an acquittal nor a conviction of the offence charged; that the order does not impose any penalty or punishment as prescribed by the Military Service Acts and the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), and is not such as the Reserve Forces Act, 1882, authorizes; that the said order purports to be made under the Military Service Acts, 1916–18, and that the Military Service Act, 1918 (8 Geo. 5, c. 5), does not apply to Ireland; that the said order is uncertain, and does not aver that the prosecutor was called out from the Army Reserve for annual training or on permanent service, and that without leave lawfully granted, or sickness or other reasonable excuse as is

(1) The order was in the following terms:—

"Whereas one John Barton, 11 B, Constable of the Police Force of said district, having apprehended one Benjamin Romney, who was found on the 14th day of September, at 3 St. Kevin's Road in said district, and brought him before me sitting as a Court of Summary Jurisdiction as a person suspected of being an absentee without leave from the Army Reserve, he being a person deemed by the Military Service Acts, 1916–18, to have been duly enlisted and forthwith transferred to the Army Reserve.

And whereas I being satisfied that the said Benjamin Romney is a male British subject, and was, since the 14th day of August, 1915, and still is, ordinarily resident in Great Britain, and that he is a person who has attained the age of 18 years, and has not attained the age of 41 years, and is a person deemed to have been duly enlisted in His Majesty's Regular Forces, and to have been forthwith transferred to the Reserve, and that he at the date of this Order is an absentee without leave from the said Army Reserve. It is ordered that the said Benjamin Romney be forthwith delivered into military custody by being handed over to Lance-Corporal Harry Fast, of the Military Foot Police, Dublin."

prescribed under the Reserve Forces Act, 1882, the prosecutor failed to appear at the time or place at which he was required at such calling out to attend; that the proclamation, dated the 12th day of July, 1918, issued by Sir Auckland Geddes, and purporting to give the directions to men belonging to the Army Reserve under the Reserve Forces Act, 1882, is ultra vires and void (2); that the said proclamation purports to be issued under the Military Service Acts, 1916–17, only; and that the prosecutor is not thereby rendered liable under the Military Service Act, 1918.

(2) ARMY RESERVE.

Directions for calling out on permanent service certain men liable to military service who have been ordinarily resident in Great Britain (i.e. England, Scotland, or Wales), but have proceeded to Ireland.

Whereas by a proclamation, dated the 4th August, 1914, His Majesty, in exercise of powers conferred on him by the Reserve Forces Act, 1882, ordered one of His Majesty's Principal Secretaries of State from time to time to give, and when given, to revoke or vary, such directions as might seem necessary or proper for calling out the Army Reserve or all or any of the men belonging thereto;

And whereas the said powers and duties of giving directions for calling out the Army Reserve, conferred on a Principal Secretary of State by His Majesty's proclamation, have been transferred to me by the Ministry of National Service Order, 1917; the Ministry of National Service Order, 1918; and the Order dated the fourth day of July, 1918, made by me under the provisions of the Ministry of National Service Order, 1918;

And whereas under the Royal Warrant dated 20th October, 1915, certain men were enlisted and transferred forthwith to the Army Reserve, and certain other men are under the Military Service Acts, 1916 and 1917, deemed to have been enlisted and transferred to the Army Reserve;

And whereas the Military Service Acts, 1916 and 1917, do not apply to any man unless he has at some time since the 14th August, 1915, been or for the time being is ordinarily resident in Great Britain, but certain men who have been or are deemed to have been enlisted and transferred to the Army Reserve under the said Royal Warrant, or under the Military Service Acts, 1916 and 1917, have proceeded to Ireland, and it is expedient that such men should forthwith be called out on permanent service;

Now, therefore, I, the Right Honourable Sir Auckland Geddes, K.C.B., Director-General of National Service, do hereby direct as follows:—

Every man who has been or is deemed to have been enlisted and transferred to the Army Reserve either under the Royal Warrant dated 20th October, 1915, or under the provisions of the Military Service Acts, 1916 and 1917, and is in

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Healy K.C. and *Farrell*, for the prosecutor:—

The order is bad on its face. The Reserve Forces Act, 1882, and the Army Act, 1881, are the two Acts conversant with the right to take this man, whom, it is alleged, is an absentee, and who has been ordered into military custody. If this is a conviction, it ought to say so. It is not a conviction. It is defective in the one vital respect—that it does not show on what evidence the magistrate made the order handing the prosecutor over to military custody, assuming that the section under which this order

Ireland, is hereby required to report himself to the police officer in charge at the police station nearest to such man's place of abode in Ireland, on or before the 17th day of July, 1918, between the hours of 10 o'clock in the forenoon and 6 o'clock in the afternoon, and there await further orders to be given to him by or on behalf of the Military Authorities.

If any such man fails, without reasonable cause or excuse, to report himself as directed above, he will be guilty of an offence under the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), and will be liable to be arrested and dealt with as a deserter or absentee without leave from military service.

Dated this 10th July, 1918.

(Signed) A. C. GEDDES.

Explanatory Notes.

Note 1.—These directions are intended to secure for service with the colours those men who are liable to service as being within the terms of the above directions, and who have not joined the Forces, but have proceeded to Ireland.

Note 2.—These directions are not intended to apply to any man who was not ordinarily resident in England, Scotland, or Wales at some time since the 14th August, 1915.

N.B.—A man who went from Ireland to reside temporarily in England, Scotland, or Wales for some special purpose, such as employment in connexion with war work, farm work, etc., would not, on that account only, be regarded as having been ordinarily resident in England, Scotland, or Wales, as the case may be.

Note 3.—It is not intended to send individual calling-up notices to the men within the terms of the above directions, but they will be proceeded against as absentees without further notice if they fail to report for service as required above. If any man is in doubt as to the application of the above directions to him, he should at once communicate, with all necessary particulars, with the police officer in charge at the police station where he is required by the above directions to report, so as that on satisfactory proof of his position he may avoid the liability of proceedings being taken against him.

has been made is sect. 154, sub-s. 4, of the Army Act. The words of that sub-section are :—"The Court, if satisfied by evidence on oath or by the confession of such person that he is a deserter, shall forthwith, as it may seem to the Court most expedient with regard to his safe custody, cause him either to be delivered into military custody, in such manner as the Court may deem most expedient, or until he can be so delivered, to be committed to some prison, police station, or other place legally provided for the confinement of persons in custody, for such reasonable time as appears to the Court reasonably necessary for the purpose of delivering him into military custody."

The word "deserter" is mentioned in the section, but a person absent without leave is in the same category. Apparently under that section the magistrate must be satisfied in one or other of two ways, viz., by evidence on oath or by confession, that the prisoner is a deserter. If so satisfied, he may hand him over. If the magistrate referred to evidence, *The King* (*Martin*) v. *Mahony* (1) would apply. The magistrate does not state in the order in the present case whether it was made on the confession of the individual or by evidence taken on oath. If the order is a conviction, it does not satisfy the terms of the Army Act. The procedure adopted by the magistrate is not under the Army Act, but under the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48). That Act is brought in, in aid of the Conscription Acts. By sect. 5 a Secretary of State may call up the whole, or as many as he thinks necessary, of the Reserve. And by sect. 2, sub-ss. 1 and 2, provision is made for calling out the Reserve Forces on permanent service. This must be done by proclamation. Sect. 12, sub-s. 2, provides that "it shall be lawful for Her Majesty by any such proclamation to order a Secretary of State from time to time to give and when given to revoke or vary such directions as may seem necessary or proper for calling out . . . the force mentioned in the proclamation, or all or any of the men belonging thereto." That is the present case. But the Military Service Act, 1918, does not apply to Ireland. No proclamation could be issued under it in Ireland until an Order in Council had

(1) [1910] 2 I. R. 695.

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been issued; and a proclamation affecting Englishmen in England cannot affect Englishmen in Ireland until the Military Service Act has been applied to this country.

The magistrate acted erroneously and without jurisdiction. By sect. 15, sub-s. 1, of the Reserve Forces Act, 1882, if a man "without leave lawfully granted . . . or other reasonable excuse" fails to report himself, he becomes a deserter."

It is as an absentee and not otherwise that Mr. Lupton dealt with this individual. A man who is guilty under this section (15) or under sect. 12 or sect. 15 of the Army Act, 1881, shall (*a*) "be tried by courtmartial, and convicted and punished accordingly; or (*b*) be liable to be convicted by a Court of summary jurisdiction, and to be sentenced to a fine of not less than forty shillings and not more than twenty-five pounds," &c.

The man must get a notice: sect. 24 of the Reserve Forces Act, 1882. It was never heard of in England that an Army Reserve could be called by a general proclamation. The substitution of this proclamation for the individual notice is ultra vires, apart altogether from the fact that there is no power to issue the proclamation in Ireland.

The accused had not had a trial before Mr. Lupton that would oust a trial by courtmartial. If this order is a conviction, it ousts the courtmartial. If it is not, it does not.

As to the Military Service Act, 1918 (8 Geo. 5, c. 5), the scheme of the Military Service Acts is to declare that all persons in Great Britain between certain ages are "deemed" to belong to the Army Reserve. Sect. 2 is the section by which the Act may be applied to Ireland; but it is only when an Order in Council has been made that the Acts apply to Ireland. No such order has been issued. Furthermore, there is no power to issue any such proclamation as this confined to Ireland. Military service must be equal in its incidence. An Englishman in Ireland cannot be made give himself up in Ireland. He may go back and give himself up in England. This proclamation puts upon the Englishman in Ireland a requirement which is not imposed on him in England. There is no power to do that given in any Act. The Civil Courts in dealing with these military cases should look on them very scrupulously.

It is plain from the proclamation and from the sections of the Reserve Forces Act that if an offence is committed the punishment of that offence is a conviction, and the infliction of a sentence. If the accused is guilty of an offence, he must be convicted. If this order is not a conviction, the authority to hand over must be recited. I submit, for all these reasons, that the order is bad.

Serjeant Matheson (with him *Henry K.C.* and *Cooper*, for the Crown) :—

This is a good order. It is not a conviction. It is an order deciding the man's status and nothing more, and the proof that it is not a conviction is that after the adjudication upon the question the person can be tried, and that is made clear by the 16th section of the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48). He might be tried by courtmartial, or by summary jurisdiction, but not by both. Until the Act of 1916, how he was to be tried was determined by the military authorities. But the Act of 1916 provides that when the question, whether a man who is deemed to be transferred to the Reserve is raised, that question must be tried by a Civil Court. Whether the man is a soldier or not is a matter for the Civil Court.

The proclamation deals solely with men who are deemed to have been enlisted and transferred to the Reserve.

Farrell, in reply :—

Before a man can be treated as an absentee he must be liable to serve, and have been called up. Under sect. 154 of the Army Act, he must be handed over to the military authorities if an absentee, and in addition he must be convicted by the Court that hands him over. This order is bad. It is no conviction. But if it is held that it is not necessary to have a conviction, the order made fixing the status of the man must conform to the statute, which this order does not do.

Cur. adv. vult.

MOLONY C.J. delivered the judgment of the Court :—

On the 17th September, 1918, Mr. Lupton, one of the divisional justices for the Dublin Metropolitan Police district, made an order under the provisions of sect. 154, sub-s. 4, of the

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Army Act (44 & 45 Vict. c. 58) directing Benjamin Romney to be forthwith delivered into military custody. The order recites that the magistrate was satisfied that the said Benjamin Romney is a male British subject, and was since the 14th day of August, 1915, and still is ordinarily resident in Great Britain, and that he is a person who has attained the age of eighteen years and has not attained the age of forty-one years, and is a person deemed to have been duly enlisted in His Majesty's Regular Forces and to have been forthwith transferred to the Reserve, and that he is an absentee without leave from the said Army Reserve.

A conditional order for a writ of certiorari directed to the said divisional magistrate was obtained from the Master of the Rolls sitting as vacation judge on the 19th September, 1918, and it is now sought to make this order absolute. The conditional order was obtained on six grounds, and it is desirable to consider each of these grounds separately.

The two grounds first stated in the conditional order are—1, that the said order is neither an acquittal nor a conviction of the offence charged, and 2, that the said order does not impose any penalty or punishment as prescribed by the Military Service Act and the Reserve Forces Act, 1882, and is not such as the latter Act authorizes. It is quite true that an order under sect. 154, sub-s. 4, of the Army Act delivering a person into military custody is neither an acquittal nor a conviction of the accused, and there is no power under the section to impose any penalty. This appears clear from a very short consideration of the principles upon which an order can be made under sect. 154, sub-s. 4, of the Army Act. Under the Military Service Act, 1916, sect. 1, sub-s. 2 (5 & 6 Geo. 5, c. 104), as amended by the Military Service Act, 1916, Session 2, sect. 1 (6 & 7 Geo. 5, c. 15), every male British subject who has at any time since the 14th day of August, 1915, been, or for the time being is, ordinarily resident in Great Britain, is deemed, subject to certain exemptions, to have been duly enlisted in His Majesty's Regular Forces for general service with the colours, or in the Reserve for the period of the war, and to have been forthwith transferred to the Reserve. Under sub-s. 2, the Army Act (with the exception of sect. 96), and the Reserve Forces Acts, 1882 to 1907, and any orders and

regulations made thereunder, were made applicable to any man who was so deemed to have been enlisted and transferred to the Reserve; and the sub-section contains an important proviso that where the question whether a man is under the said statute deemed to have been enlisted and transferred or not, is raised on proceedings in respect of an offence alleged to have been committed by a man as a member of the Reserve, whilst he was a member of the Reserve in pursuance of the transfer under this Act, or in respect of any alleged failure to comply with any order calling him up from the Reserve for permanent service, that question shall be decided only on proceedings before a Civil Court.

It is necessary in the first instance to inquire what jurisdiction the magistrate had in the matter. Under sect. 15, sub-s. 1, of the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), when a man belonging to the Army Reserve is called out for annual training or on permanent service, and such man, without leave lawfully granted, or such sickness or other reasonable excuse as may be allowed in the prescribed manner, fails to appear at any time and place at which he is required upon calling out to attend, he shall, if called out on permanent service, be guilty, according to the circumstances, of deserting within the meaning of sect. 12, or of absenting himself without leave within the meaning of sect. 15 of the Army Act, 1881. Under sub-s. 2 a man belonging to the Army Reserve who commits an offence under this section, or under sect. 12 or sect. 15 of the Army Act, 1881, whether otherwise subject to military law or not, shall be liable to be tried by court-martial and convicted and punished accordingly, or to be convicted by a Court of summary jurisdiction and to be sentenced to a fine of not less than 40*s.* and not more than £25, and in default of payment, to imprisonment, with or without hard labour, for any term not less than seven days and not more than the maximum term allowed by law for the non-payment of the fine; and may in any case be taken into military custody. This sub-section provides an alternative mode of punishment, and it is a matter of importance to see with whom the choice rests. Under sect. 20 of the Reserve Forces Act, 1882, His Majesty may, by order signified under the hand of a Secretary of State, from time to time, make, and when made, revoke and vary any order with respect to the Army Reserve;

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and sect. 26 provides with respect to the trial and punishment of men charged with offences which, in pursuance of the Act, are cognizable both by a courtmartial and by a Court of summary jurisdiction, that an alleged offender shall not be liable to be tried both by courtmartial and by a Court of summary jurisdiction, but may be tried by either of such courts according as may be prescribed by orders or regulations under the Act. The King, accordingly, made regulations under his Royal Warrant, dated 23rd September, 1911, and under par. 50 of the regulations a reservist charged with an offence under the Reserve Forces Act, 1882, which is cognizable both by a courtmartial and by a Court of summary jurisdiction, shall not be tried before a Court of summary jurisdiction until the sanction of an officer who has power to direct the offender to be tried by a courtmartial, or of an authority superior to such officer, shall have been signified in writing to the Court before which the trial is to take place. If this regulation were still in force the magistrate could not have convicted summarily without the sanction in writing of the military authorities. However, it now appears that after the passing of the Military Service Act, 1916, a new warrant was issued by the King on the 1st March, 1916 (Army Order, 110, Army Orders, 1916), which completely annuls par. 50 of the Royal Warrant of 1911 so far as it affects a reservist who fails to report himself when called up on permanent service. Paragraph 114 is as follows:—"A reservist who fails to report himself when called up on permanent service, and who thereby commits an offence under sect. 15 of the Reserve Forces Act, 1882, or a reservist who commits an offence under sect. 6 of the Reserve Forces Act, may be tried before a Court of summary jurisdiction without the sanction of an officer who has power to direct the offender to be tried by courtmartial." It is, therefore, clear that a Court of summary jurisdiction may now convict summarily, and, subject to any punishment it may give, direct the accused to be delivered into military custody, or, without convicting, direct the accused to be delivered into military custody under sect. 154, sub-s. 4, of the Army Act, 1881, observing, however, the provisions of the Military Service Act, 1916, sect. 1, sub-s. 2, as explained in the *King* v. *Jones* (1).

(1) [1917] 2 I. R. 7.

The justice in the present case did not convict, but simply exercised his power of delivering the accused into military custody, and, therefore, the two grounds first stated in the conditional order do not in any way affect the validity of the justice's action.

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The third ground is that the order purports to be made under the Military Service Acts, 1916–1918, and that the Military Service Act of 1918 does not apply to Ireland at the present time. It is quite true that the Act of 1918 does not apply to Ireland, but it was necessary to enumerate the Acts because the particular section under which the accused was found to be an absentee [Military Service Act, 1916 (Session 2), sec. 1] had been repealed by the Act of 1918, but subject to the proviso that without prejudice to the general application of sect. 38 of the Interpretation Act, 1889, with regard to the effect of repeals, the repeal of the said enactment should not affect any obligation whatsoever incurred by any man to whom sect. 1 of the Military Service Act, 1916, or sect. 1 of the Military Act, 1916 (Session 2), applied. It was right to enumerate the Act of 1918, as it might otherwise be argued that the Act of 1916 had been repealed, and that the accused could not be declared an absentee under it.

The order is next impugned on the ground of uncertainty, but we are unable to see any foundation whatever for this, as the order finds in specific terms that the accused was an absentee, and states the grounds upon which that decision could be sustained.

The next ground relied upon was that the order dated 10th July, 1918 (1), issued by Sir Auckland Geddes, and purporting to give directions to men belonging to the army reserve under the Reserve Forces Act, 1882, is ultra vires and void. This view, however, was not seriously pressed upon us, and there does not seem to be any ground whatever for it. The order is confined to men who are liable to military service, and who have been ordinarily resident in Great Britain, but who have proceeded to Ireland, and this Court in *The King* v. *Jones* (2) has held that the Military Service Acts enable a person ordinarily resident in England to be arrested, dealt with, and handed over to military custody in Ireland.

(1) See note, *ante*, p. 133.

(2) (1917) 2 Ir. R. 7.

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The last ground stated in the conditional order is that the order of Sir Auckland Geddes purports to be issued under the Military Service Acts, 1916 and 1917, only, and that the accused is not thereby rendered liable under the Military Service Act, 1918. This is quite true, but it is absolutely irrelevant in the present case, as it was not sought to render the accused liable under the Miliary Service Act, 1918.

Another ground relied on, although not expressly stated in the conditional order, was that the magistrate must be satisfied either by evidence on oath or by the confession of the accused that he was ordinarily resident in Great Britain, and that in the present case the order simply recites that the magistrate was satisfied, without saying whether it was by reason of oral evidence or the confession of the accused, or otherwise. In our opinion, where the magistrate says that he was satisfied, the necessary presumption is that he was satisfied by legal evidence, and no circumstance is stated in the affidavit from which it could be inferred that the magistrate was acting otherwise than upon the sworn testimony which he had before him.

We are satisfied that there are no grounds in this case sufficient to justify the issue of a writ of certiorari, and consequently that the conditional order should be discharged.

Solicitor for the prosecutor : *James Brady.*

Solicitor for the Crown : *The Chief Crown Solicitor.*

H. J. M'C.

THE KING (BYRNE, INSPECTOR-GENERAL, R.I.C.) *v.* THE LORD MAYOR, ALDERMEN, AND CITIZENS OF BELFAST (1).

K. B. Div. 1918. Nov. 5, 6, 7, and 8. Dec. 10.

Local Government — Belfast Police Force — "Free quota" and "extra police" — Allocation of "extra police" — 28 & 29 Vict. c. 70, s. 6 — Jurisdiction to award costs to or against the Crown.

It is the duty of the Belfast City Council to make and levy a rate sufficient for the payment of the amount certified by the Inspector-General of the Royal Irish Constabulary to be chargeable against the Borough of Belfast under the Constabulary (Ireland) Amendment Act, 1865 (28 & 29 Vict. c. 70, sect. 60), for the cost of the extra police force allocated to the police district of Belfast, notwithstanding that the total "free quota" of 10,006 men for all Ireland provided for by that Act has not been allocated.

Peremptory mandamus to the defendants to make and levy such a rate granted with costs.

The Court has jurisdiction in cases where the circumstances justify such an order to award costs to or against the Crown. Circumstances which would justify such an order considered.

In re Madden's Estate ([1902] 1 I. R. 63) distinguished.

MANDAMUS.

This was an application to make absolute a conditional order obtained on the 15th May, 1918, for a writ of mandamus directed to the Lord Mayor, Aldermen, and Citizens of Belfast, commanding them to forthwith make and levy a rate under the provisions of 28 & 29 Vict. c. 70, s. 6, sufficient for the payment of £15,911 4*s.* 9*d.*, being the amount of moneys chargeable for the half year ending 30th September, 1917, for the extra police force allocated to Belfast.

The facts and arguments appear sufficiently from the judgment of the Lord Chief Justice.

S. L. Brown K.C. and *Richard Best K.C.* (with them *Cooper*), for the Crown.

Denis Henry K.C., *R. F. Harrison K.C.*, and *Arthur Black*, for the defendants.

(1) Before MOLONY C.J., and GIBSON and MADDEN JJ.

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MOLONY C.J. delivered the judgment of the Court:—

By the 6 & 7 Wm. 4, c. 13, provision was made for the establishment of a constabulary force in Ireland. The Lord Lieutenant was empowered to appoint chief and other constables for each county, not exceeding a certain number specified in sect. 11 of the Act, and power was given in subsequent sections to appoint an additional number of constables upon a certificate of the magistrates of the county as to the necessity therefor, and the Lord Lieutenant, with the advice of the Privy Council, could also proclaim any county or portion thereof to be in a state of disturbance and appoint an additional police force. Sect. 35 provided that the expenses of the force should in the first instance be advanced and paid out of the consolidated fund. Sect. 36 provided that a moiety of all moneys advanced out of the consolidated fund should be raised by grand jury presentment off each county, county of a city, or county of a town, to which the same should be declared by the Lord Lieutenant to relate, and in or for which such expenses should have been incurred. Under sect. 37 the Inspector-General was to ascertain the amount of moneys chargeable on each county, county of a city, or county of a town; and on his certificate the grand jury were required to make a presentment for the amount stated in such certificate.

It was afterwards thought desirable to have a reserve force, and, accordingly, by 2 & 3 Vict. c. 75, the Lord Lieutenant was authorized to appoint two sub-inspectors, four head constables, and 200 constables and sub-constables to be kept at the depot; and under sect. 7 the expenses of the reserve force were to be paid out of the consolidated fund; but sect. 8 provided that one moiety of the money advanced to meet the expenses of such officers and men of the reserve as were employed in any county, city, or town pursuant to an order of the Inspector-General should be raised by grand jury presentment.

Under 9 & 10 Vict. c. 97 the reserve force was increased to 400, and the entire cost of the constabulary force and of the reserve force was to be advanced and paid out of the consolidated fund; but it was provided by sect. 5 that nothing was to relieve the counties from a moiety of the expense of—(*a*) any further

constabulary force which had been applied for by the magistrates of a county; or (*b*) of the reserve force when employed therein; "or (*c*) in case the number of the constabulary force in and for any barony, half barony, county of a city, county of a town, or district of less extent than any barony or half barony, shall be increased by the Lord Lieutenant stationing or appointing therein or therefor additional sub-inspectors, head constables, constables, and sub-constables as aforesaid or otherwise." The effect of this statute was that the Treasury became liable for the entire cost, subject to the three exceptions specified in sect. 5. It is not surprising that Parliament should have thought it desirable to put a limit upon the expenditure which might have to be borne by the consolidated fund; and, accordingly, by 11 & 12 Vict. c. 72, it is provided that the total number of officers and men wholly chargeable to the consolidated fund shall be such as the Lord Lieutenant may from time to time consider to be required in each county, city, or town, but shall not exceed in any year the numbers specified in the schedule to the Act. In the schedule the number allocated to each county is set out; and the total for all Ireland is stated to be 10,006.

By 20 & 21 Vict. c. 17, the number of police allotted to each district was set forth in an amended schedule; and power was given to the Lord Lieutenant, with the advice of the Privy Council, to vary the number of police allocated to a particular district, but with the same limitation as to the total number as before. This state of affairs continued until 1865, when, as a result of the report of a Viceregal Commission, it was considered desirable to give the constabulary force jurisdiction in the municipal borough of Belfast; and, accordingly, the Constabulary (Ireland) Amendment Act, 1865 (28 & 29 Vict. c. 70), was passed. This Act provides for the abolition of the old police force; and the constitution of the municipal borough of Belfast as a distinct district called "the town of Belfast," and further provides that the provisions of the Acts relating to the constabulary forces in Ireland shall apply to the town of Belfast. It then became necessary to ascertain the number of constables in Belfast that should be charged to the consolidated fund; and, accordingly, by sect. 3, a new schedule was substituted for the schedule annexed to

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20 & 21 Vict. c. 17; and it is thereby provided that the number of constables allotted to the town of Belfast should not be less than 130. The Act, however, contemplated by its express terms that there should be an additional police force, not exceeding 320, as the Lord Lieutenant might think fit to provide "for the more effectual preservation of the peace of the said town"; and that such additional number of men with the 130 men should constitute the ordinary constabulary force of the town. A clear distinction being thus drawn between the number of men charged on the consolidated fund and the additional men, the Act proceeds to provide that the expense of the additional force is to be advanced out of the consolidated fund in the first instance, but that a moiety of the money so advanced is to be repaid by the Town Council of the borough of Belfast by means of rates. The question then arose as to how this sum was to be ascertained, and sect. 6 provided the machinery in very clear and explicit language as follows:—"The Inspector-General of Constabulary shall, with the assistance of the receiver, twice in each year, ascertain the amount of the moneys chargeable under the provisions of this Act to the said town of Belfast, and shall make out a certificate thereof under his hand, specifying the force or service in respect whereof such charge may have been incurred, and transmit the same when signed by the receiver, and approved or certified by the Chief or Under Secretary to the Lord Lieutenant, to the Town Clerk of the borough of Belfast, who shall lay the same forthwith before the Town Council, and thereupon the Town Council shall forthwith make and levy a rate sufficient for the payment thereof, and shall thereout, or out of any moneys in their hands, pay the amount mentioned in such certificate to the Paymaster-General's Department in Ireland."

The legislation since 1865 may be very shortly stated. Under the 48th Vict. c. 12, power was given within three months after the passing of the Act, and thereafter at the end of each succeeding term of three years, to alter or vary the number of constables specified in the schedule to the Act of 1865 to such number as the Lord Lieutenant might consider to be required, but so that the total number to be distributed as free quota should not exceed the total number specified in the schedule to that Act. The free quota

was altered by the Lord Lieutenant from time to time, and in 1894 it was raised to 500, at which figure it has since remained.

Under the statute of 1865, the extra police force could not exceed 320 men. It had, however, been seen that with the growth of Belfast and the extension of its boundaries, a much larger force was required, and that while the fixed quota could be and had been increased, it was not possible without legislation to increase the number of the extra police force. By 60 & 61 Vict. c. 64 (Constabulary (Ireland) Act, 1897), so much of sect. 4 of the Act of 1865 as limited to 320 men, the power to add to the constabulary force allotted to Belfast was repealed. Since 1897 the Lord Lieutenant has accordingly on two occasions increased the number of extra police allotted to Belfast, and in 1912 it was fixed at 733, at which figure it has since remained. Half the cost of these 733 men must be raised in accordance with the provisions of sect. 6 of the Act of 1865. Under that section, the Inspector-General, with the assistance of the Receiver of the force, is to make out a certificate of the amount of the moneys chargeable to the town of Belfast, and he is to transmit the same when signed by the Receiver and approved and certified by the Chief or Under-Secretary to the Town Clerk of Belfast who is to lay the same before the Town Council; and the section then provides that "the Town Council shall forthwith make and levy a rate sufficient for the payment thereof, and shall thereout or out of any moneys in their hands pay the amount mentioned in such certificate to the Paymaster-General's Department in Ireland."

The Inspector-General made out his certificate on the 16th November, 1917, which was in the form which has always been used, and is in our opinion correct. It claims the sum of £15,911 4*s.* 9*d.*, and he signed it in his dual capacity as Inspector-General and Receiver, and the certificate was approved and certified by the Under-Secretary on the 23rd November, 1917. This certificate was duly presented to the Corporation of Belfast on the 27th November, 1917, and on the 29th November, 1917, the police committee passed a resolution "that as the committee dispute the basis upon which the charges are made payment of the account be declined," and at the monthly meeting of the council, held on the 3rd December, 1917, the resolution of the

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police committee was confirmed. Following this distinct refusal by the Corporation, the conditional order in this case was obtained on the 15th May, 1918, and cause has been shown against same in two affidavits—one by Mr. Robert Meyer, the town clerk, and the other by Mr. George Geale, the accountant. These affidavits were framed with the express object of showing that the free quota of 500 men is not the just proportion of the constabulary force, and that it ought to be increased. Mr. Geale, in his affidavit, has exhibited various tables with the object of showing that, as in nearly all the counties and boroughs in Ireland the free quota is sufficient for all police purposes, it is unjust to have the quota fixed so low for Belfast that it should be necessary to employ over 700 extra men. On the other hand, it has been pointed out by Mr. Brown that the proportion of free quota to extra police is now much more favourable to Belfast than it was in 1865; and that although the population of Belfast has very largely increased in the interval, the number of police included in the free quota has been increased to a still larger degree. In our judgment, this Court has nothing whatever to say to the series of interesting statistical tables which are exhibited in Mr. Geale's affidavit, nor are we concerned with the deductions which have been drawn from them by Mr. Henry on the one hand, and by Mr. Brown on the other. Our sole duty is to enforce the demand of the Inspector-General, if we are satisfied that it is legally established. It is, however, contended by Mr. Henry and Mr. Harrison that it is not legally established, because they say that before any extra police are sought to be charged for, the Lord Lieutenant must allot as free quota amongst the various counties and boroughs 10,006 policemen, and that it appears from the last allocation made by the Lord Lieutenant, with the advice of the Privy Council in 1909, the number then allotted was 9303. Such a contention is not open to the Corporation in the present case. The duty of the Lord Lieutenant and the Privy Council under the Act of 1885 is to fix the number of free quota in each county and borough, but with the limitation that the total number to be distributed as free quota shall not exceed 10,006. In the present case, it was quite open to the Privy Council to fix the number at 9303, and in any case it was the manifest duty of the Inspector-General to obey and follow the order of the Privy Council.

It was scarcely concealed by counsel for the Corporation that their real and only object in resisting the mandamus was to attack the number of the free quota. When, however, it was seen that this attack could not succeed, Mr. Harrison proposed to argue that the certificate of the Inspector-General was not binding, because, as he stated, the Inspector-General had openly disregarded the statutory provisions which must be given effect to before he made his certificate. There is no trace of any such contention in the affidavits showing cause which were filed on the 4th June, 1918, but at the close of the argument he asked for the leave of the Court to read an affidavit which had only just been sworn and had not yet been filed in support of his contention. It would be obviously wrong to allow such an affidavit to be read impugning the conduct of an officer in the discharge of his public duties, and making a wholly new case, without giving the other side an opportunity of considering and the Inspector-General of answering the allegations stated to be contained in the affidavit. We accordingly thought that if permission was to be given to use this affidavit, the argument should be adjourned and that all the costs thereby occasioned should be borne by the Corporation. This offer was declined by Mr. Harrison, and consequently the Court refused permission to him to read the affidavit.

We are clearly of opinion that the contention of the Corporation wholly fails, and accordingly that the conditional order for mandamus should be made absolute, and the cause shown disallowed, with costs.

GIBSON J.—We will make an order for a peremptory mandamus.

R. F. Harrison K.C.—If we had succeeded, we could not have got costs against the Crown. I submit that they cannot have costs against us.

MOLONY C.J.—The question of costs may be mentioned to-morrow.

Nov. 8.

The Court having intimated that it would hear argument on the question of costs—

R. F. Harrison K.C.—I submitted yesterday that we could not get costs against the Crown, if we had succeeded, and reciprocally they should not have an order for costs against the defendants.

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The general proposition that the Crown never pays nor receives costs, except in certain well-defined classes of exceptional cases, has been constantly recognized by the highest tribunals. It was settled by *R.* v. *Archbishop of Canterbury* (1) that where the Crown is a party to the argument of a rule for a prerogative writ of mandamus, the Court has no jurisdiction to give costs either to or against the Crown, but the Court did not express an opinion as to matters other than the prerogative writ of mandamus, or even as to that writ when it was applied for, by, or against, the officers of executive departments of the public service in relation to their statutory or other duties.

The same principle would, it seems, also apply to the latter case unless there was some specific statutory provision for the payment or receipt of costs, and also to writs of prohibition and certiorari. The decision in *R.* v. *Archbishop of Canterbury* (1) must be taken to supersede, in this respect, such cases as *R.* v. *Secretary of State for War* (2) and *R.* v. *Staines Union* (3), where costs were awarded in mandamus proceedings against and on the prosecution of Government departments respectively, but without argument. Counsel referred to Robertson's Civil Proceedings by or against the Crown, p. 619, and also to *Mews* v. *Reg.* (4); *Middlesex Justices* v. *Reg.* (5); *Johnson* v. *Rex* (6).

The Crown Suits Act, 1855 (18 & 19 Vict. c. 90), does not affect the present case, since it only applies to proceedings taken by the Attorney-General or Lord Advocate.

On this question of costs, the law appears to be in an unsettled condition. Lord Campbell C.J. in *R.* v. *Beadle* (7) says:—"The law is not in a satisfactory state, and I think it desirable that it should be reviewed, and the Excise and Customs put upon the same footing. It seems to me desirable that in all such cases costs should be paid and received, as between subject and subject, as otherwise the Crown does not receive costs where it is just that it should receive them; and, on the other hand, the subject does not receive them where it is just that he should."

(1) [1902] 2 K. B. 503; 71 L. J. K. B. 932.
(2) [1891] 2 Q. B. 326; 60 L. J. Q. B. 457.
(3) [1894] 10 R. 292, 307.
(4) [1883] 8 A. C. 339, at p. 353.
(5) [1884] 9 A. C. 757, at p. 786.
(6) [1904] A. C. 817, at p. 825.
(7) 7 E. & B. 492.

GIBSON J.—Are not the present proceedings an action within the meaning of the definition in the Judicature Acts?

Harrison K.C.—The Judicature Acts and Rules do not enable the Court to order costs to be paid by persons who, before the Acts came into operation, could not have been ordered to pay them: *In re Mills' Estate* (1); *In re Madden's Estate* (2).

The present case cannot be distinguished from *The King* (*The Postmaster-General*) v. *The Great Northern Railway Co.* (3). In *The Justices of Middlesex* v. *The Queen* (4)—a case in which the question was whether the Lords Commissioners of the Treasury, who were the respondents, had power to make a certain award under the Prison Act, 1877—R. S. Wright, for the appellants, submitted after the appeal was dismissed, and Danckwerts, for the Crown, admitted that that was not "one of the class of cases in which the Crown receives or pays costs." That case is precisely this case. In *Johnson* v. *The King* (5), a case before the Privy Council, the question of costs having been reserved for further argument and consideration, Lord Macnaghten, at page 824, says:—"All the cases seem to fall under one or other of the following three heads:—1. cases where the Crown has been treated as an ordinary litigant, under the authority of local statutes, as is generally the case in the self-governing Colonies; 2. cases where the question arose under a petition of right or some proceeding analogous to a petition of right; 3, exceptional cases where justice seemed to require that the Crown should pay costs, or where the Crown was not unwilling to be treated as an ordinary litigant. We are of opinion that in dealing with costs in cases between the Crown and a subject, this Board ought to adhere to the practice of the House of Lords, and that in future the rule should be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule."

In *The King* (*The Postmaster-General*) v. *The Great Northern Railway Co.* (3) the prosecutor obtained an order from the King's Bench that a writ of mandamus should issue against the defendants,

(1) 34 Ch. Div. 24.
(2) [1902] 1 I. R. 63.
(3) [1908] 2 I. R. 32.
(4) 9 App. Cases, 757.
(5) [1904] App. Cases, 817.

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and the defendants appealed. Before the appeal came on for hearing, the defendants gave notice to the prosecutor that they would not proceed with the appeal, and it was held that the prosecutor was not entitled to the costs incurred before receipt of the notice withdrawing the appeal. In that case the Lord Chancellor (Sir Samuel Walker, Bart.) said:—"This is really an attempt to re-open the question decided by the Court in *Madden's Estate* (1). We came to the conclusion in that case that there is no jurisdiction to award costs against the Crown, unless power to do so is expressly given by statute . . . We intend to follow the rule already laid down by this Court, that we will not allow costs to the Crown in cases in which, if unsuccessful, the Crown would not be liable for costs."

[MOLONY C.J. referred to *The Postmaster-General* v. *Great Southern and Western Railway Co.* (2), and the reference therein to the discussion on the question of costs in the case of *The Postmaster-General* v. *National Telephone Co.* (3).]

Harrison K.C.—These cases are distinguishable, as the Postmaster-General is sued not as the Crown, but as an ordinary litigant by virtue of sect. 11 of the Telegraph Act, 1878 (41 & 42 Vict. c. 76).

S. L. Brown K.C.—It is now well established that the alleged practice of not giving costs to the Crown where costs cannot be given against them does not exist. Since the case of *Postmaster-General* v. *National Telephone Company* (3), at any rate, it must be taken as settled law that there is no such practice, and that the Court will give costs where costs ought to be given. The decision in that case has the added authority of Lord Macnaghten, who was a member of the House, and took part in the discussion. Although the case is reported on the general question in the Law Reports, it is not reported on the question of costs; but the Earl of Halsbury entirely denies that any such practice as that stated by Mr. Harrison has ever been laid down. What occurred in the *National Telephone Case* (3) as to costs appears, from the judgment of Sir Ignatius J. O'Brien C. in the case of *The*

(1) [1901] 2 I. R. 6. (2) [1916] 1 I. R. 74.
(3) [1909] A. C. 269.

Postmaster-General v. *Great Southern and Western Railway Company* (1). Each case may be considered on its merits, and costs given accordingly. There being no such practice, the Court undoubtedly has jurisdiction. Lord Alverstone C.J. in *Rex* v. *Archbishop of Canterbury* (2), delivering the judgment of the Court, says:—"We have not been referred to any case, nor have we been able to discover any, in which the ancient doctrine that in matters at common law 'the Crown never paid nor received costs,' . . . has been expressly questioned in relation to the prerogative writ of mandamus . . . We must not be understood as expressing any opinion either in relation to matters other than the prerogative writ of mandamus, or even as to that writ when it is applied for by or against the officers of executive departments of the public service in relation to their statutory or other duties . . . There must often be litigation which does not directly affect any prerogative of the Crown, and as to which no good reason can be assigned for the denial of costs to the successful party. And the case of *Moore* v. *Smith* (3) supports this view."

This is a case of departmental litigation where, in the interests of the due administration of an executive department, proceedings had to be taken. The proceedings are similar to what would have been taken in the Exchequer Court, and there costs would be in the discretion of the Court.

Cur. adv. vult.

MOLONY C.J. intimated that Mr. Justice Gibson would deliver the judgment of the Court.

Dec. 10.

GIBSON J.:—

In this case the Inspector-General, in pursuance of a statutory obligation to enforce payment of public money, applied for a mandamus—now an action: *R.* v. *Westminster Assessment Committee* (4). The Court having awarded a peremptory mandamus, proposed to order the defendant to pay costs, but Mr. Harrison objected that there was no jurisdiction to do so, the rule being, as he argued, inflexible that an officer representing the Crown could

(1) [1916] 1 I. R. 74, at p. 89.
(2) [1902] 2 K. B. 571.
(3) 1 E. & E. 597.
(4) [1917] 2 K. B. 215.

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not be made liable for costs, and that, therefore, the subject must also be free, on the principle that the Crown neither pays nor receives costs. In support of his proposition he relied on *In re Madden's Estate* (1) and the two cases therein applied, and also *Mews* v. *Regina* (2), all dealing with the question of the Crown's liability for costs, and not with the rights of an officer representing public finance to recover costs which, if borne by the department, would diminish the debt or sum recovered. He cited two cases on this latter point: the *Middlesex Case* (3) and *Rex* v. *Archbishop of Canterbury* (4). In the former the decisions of the Courts below were reversed on difficult legislation, and counsel agreed that the litigation was not of a class where costs were given. In the latter the Archbishop, represented by the Treasury Solicitor (whose costs afterwards came before the Court in *R.* v. *Archbishop of Canterbury* (5)), got costs; the Attorney-General had intervened of his own motion, as he did in *David M'Laren and Another* v. *The Attorney-General for the Province of Quebec* (6), the matter directly affecting the prerogative of the Crown as head of the Established Church. He was refused separate costs. No question of financial liability was involved; and the language of Wright J. rather supports jurisdiction to give costs in such a case as the present. *In Re Mills' Estate* (7) was also much relied on. For the prosecutor Mr. Brown contended that the recent decision of the House of Lords, stated in *The Postmaster-General* v. *National Telephone Company* (8), in the judgment of the Lord Chancellor, was conclusive that there was jurisdiction to give costs against, and a fortiori, to the prosecutor, and that in each case the decision was left to the sound discretion of the Court.

Assuming, for the present, in favour of the defendants, that there was no jurisdiction to give costs against the prosecutor, I do not think that the ancient formula that the Crown does not in such case receive costs can now be taken to represent anything more than a working principle guiding discretion, founded, not on want of jurisdiction, but on reciprocity.

(1) [1901] 2 I. R. 32.
(2) 8 App. C. 353.
(3) 9 App. C. 787.
(4) [1902] 2 K. B. 503.
(5) [1903] 1 K. B. 289.
(6) [1914] A. C. 258.
(7) 34 Ch. D. 24.
(8) [1916] 1 K. B., at p. 89.

In administration and charity cases, the Attorney-General never is required to pay costs, but he gets them. The authorities show that he recovers costs in other instances according to the nature of the litigation, and the merits of the contestants' case. In *Reg.* v. *Bishop of Cork* (1) payment of costs was imposed as a condition to amendment of pleading. In *The Attorney-General* v. *Cox* (2) he was given his costs of exceptions in mortgage proceedings relating to public money. In *Pringle* v. *Secretary of State for India* (3) an untenable claim was dismissed with costs. The same principle was applied in *Reg.* v. *Tipperary Justices* (4). In *Shenton* v. *Smith* (5) costs were given against an unsuccessful promovent. Lord Macnaghten, who considered the conflicting decisions as to awarding costs against the Crown in *Johnson* v. *Rex* (6), was a party to this decision. In *The Attorney-General* v. *Albany Hotel Company* (7) the defendant was made to pay the costs of an unfounded motion. In *The Winkfield* (8) (as to the right of the Postmaster-General as bailee of letters and parcels), after consideration, the Court of Appeal, Collins M.R., Stirling and Mathew L.JJ., gave the Postmaster-General costs, though he could not have been made liable by anyone whose letters were lost. What distinction is there between the Attorney-General or public official resisting an unfounded claim and vanquishing an unsustainable defence? In *The Attorney-General* v. *Tomline* (9), a prerogative case, the defendant was decreed in costs. So costs of exceptions to an answer were given in *The Attorney-General* v. *Corporation of London* (10). The Crown also received costs in *Wyatt* v. *Attorney-General of Province of Quebec* (11), Lord Macnaghten being one of the Board. *Reg.* v. *Esmonde and Strange* (12) is to the same effect, a case of pure prerogative not affecting property, as the *Attorney-General* v. *Tomline* (9) did. The practice of the Court, at one time, may have differed; but, in its present shape, as illustrated by judicial action, it is quite inconsistent with there being either want of jurisdiction or a settled rule of law binding all Courts

(1) 11 I. L. R. 114.
(2) 3 H. L. C. 240.
(3) 40 Ch. D. 288.
(4) [1897] 2 I. R. at pp. 514, 515.
(5) [1895] A. C. 229.
(6) [1904] A. C. 817.
(7) [1896] 2 Ch., at p. 703.
(8) [1902] P. 42.
(9) 12 Ch. D. 214; 14 Ch. D. 59.
(10) 12 Beav. 8, at p. 171.
(11) [1911] A. C. 489.
(12) 20 L. R. Ir. 278.

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alike, which deprives the State officer, a justiciable person, of capacity to recover costs. In difficult cases, where public interests are concerned, the Court often declines to give costs, as in *The Attorney-General* v. *Dean and Canons of Windsor* (1) and *Minister of Lands* v. *Coote* (2), but this was in the exercise of discretion. It is impossible to suppose that in awarding costs the Courts disregarded a settled rule of law. Since the Judicature Act a uniform practice should be followed in all branches of the Court, and if there was any divergence before, the most convenient and sensible practice should now be followed. The practice has developed; as the decisions show, the courts no longer are bound by any inflexible formula. The last case on the subject of the Crown getting costs is *Hosier Brothers* v. *Earl of Derby* (3).

2. I now proceed to the Judicature Act, sect. 53, and the analogous English legislation. In sweeping terms, subject to specified exceptions, and subject to rules, it leaves all costs to discretion, and gives jurisdiction over costs where none existed before, thus getting rid of *In re Mill's Estate* (4) and *Reg.* v. *Parlby and Others* (5), where it was held that the English costs rule had not that effect. The enactment was preceded by many statutes specially dealing with Crown costs. The English Statute, 1890, 53 & 54 Vict. c. 44, sect. 5 (followed by the Act of 1894, 57 & 58 Vict. c. 16, sect. 2, sub-s. 3), was on the same lines as our sect. 53, but with the material difference that sect. 4 expressly excepted criminal cases and matters and proceedings at the Crown side. The exception, according to a well-known principle of construction (*R.* v. *Shrewsbury* (6)), enlarges the adjoining language, which, but for the exception, would have embraced the excepted subject-matter. The statute has been dealt with in many cases: *London County Council* v. *Churchwardens of West Ham* (7); *Reg.* v. *London Justices* (8); *Reg.* v. *Jones* (9); *R.* v. *Woodhouse* (10), where it was held that sect. 4 was a proviso attached to sect. 5, and that the latter section created a new jurisdiction over costs. Our sect. 53, following sect. 52, contains no such exception, and our cost rules

(1) 8 H. L. C., at p. 404.
(2) [1915] A. C. 583.
(3) [1918] 2 K. B. 671.
(4) 34 Ch. D. 24.
(5) [1889] W. N., at p. 190.
(6) 3 B. & Ad. 216.
(7) [1892] 2 Q. B. 173.
(8) [1894] 1 Q. B. 453.
(9) [1894] 2 Q. B. 382.
(10) [1906] 1 K. B. 501.

at the Crown side approved by the Viceroy (sect. 61), and subject to be annulled by Parliament (sect. 69), purport to extend to all civil proceedings at the Crown side. Even supposing that the provision might not extend to the assertion of the Crown prerogative proper (though there were decisions which would support such extension), does it not apply to proceedings by an officer, or department, to recover money or property of the State? The statute was a comprehensive unifying enactment for the advancement of justice: *Reg.* v. *Wright* (1). Sections 21, 23, 24, 35, 50, 65, and 66, and, indeed, the scope of the entire Act, dealing with trials, new trials, and appeals, suggest that all civil proceedings at the Crown side, on behalf of the State, as well as of individuals, were to be governed by sect. 53 if appropriate rules were made. *Moore* v. *Smith* (2) and *Thomas* v. *Pritchard* (3) would support that conclusion; see also *Dyson* v. *Attorney-General* (4) as to the Crown now being subject to new jurisdiction. If the Judicature Act applies to all proceedings by the Crown (where not excepted), including actions, trials, and appeals, it seems unlikely that consequential costs should be left unprovided for, and sect. 53 picked out as still leaving the Crown disabled from getting or protected from being liable for costs. The legislation, assisted by the important English decisions on the Act of 1890, c. 44, has not hitherto received special attention. In the cases where, since 1875, costs were given to, or against, the State officers or department, the result was arrived at as matter of judicial practice and discretion and not as being specially governed by the Judicature Acts. As this question was not argued, I express my opinion with diffidence. It may be that, even if the State officer is not liable for costs, he may by resorting to the statutory procedure recover them.

3. I next take up the authorities as to giving costs against a public official where his application or suit is dismissed. *R.* v. *Beadle* (5) decided that an officer of Excise could not, in a summary jurisdiction case governed by statute, be made to pay costs. The case may be contrasted with *Thomas* v. *Pritchard* (6), the reasoning in which has a bearing on our Judicature Act. Costs were given against officials in many cases, e.g., the Board of

(1) 1 A. & E. 434.
(2) 1 E. & E. 597.
(3) [1903] 1 K. B. 209.
(4) [1911] 1 K. B. 410.
(5) 7 E. & B. 492.
(6) [1903] 1 K. B. 209.

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Trade, represented under 30 & 31 Vict. c. 72 by a parliamentary secretary; *The Arizona* (1); *Attorney-General* v. *Emerson* (2), a case as to foreshore; *Callender, Sykes, & Co.* v. *Colonial Secretary of Lagos* (3); *The Defence Acts and Bear Island Defence Works, Ex parte Doyle* (4), a case under the Lands Clauses Acts, therefore special. The jurisdiction was considered in *Johnson* v. *The King* (5); there are other cases; *Attorney-General for New South Wales* v. *Dickson* (6); *Attorney-General for Trinidad* v. *Bourne* (7); *The Attorney-General* v. *M'Carthy* (8), a case of foreshore, like the *Attorney-General* v. *Emerson* (2). To the same effect are the *Attorney-General of Southern Nigeria* v. *Holt & Co.* (9) and *The Attorney-General for New South Wales* v. *Williams* (10). Since 1904 all Privy Council cases as to costs must be taken to follow the House of Lords' practice which they illustrate. Costs were last given against the Secretary of State in *Heffernan* v. *Secretary of State for War* (11). Finally came *Postmaster-General* v. *Great Southern and Western Railway* (12), decided some years before, in which the existence of any inflexible rule was denied, and the allowance of costs was treated as matter of judicial discretion. I do not think that the decision in the House of Lords, or our Court of Appeal, was based on the Postmaster-General being a corporation, or that *The Winkfield* (13), where he was given his costs, was on that ground. "Cursus curiae lex curiae" appears to apply.

4. *Re Madden's Estate* (14) is, however, pressed as a conclusive authority the other way. So it is, unless it can be distinguished or has ceased to be binding as inconsistent with subsequent decisions of paramount authority. It is distinguishable because it does not deal with the jurisdiction to give costs dealt with in the earlier part of my judgment. It relates only to costs against the department. The considerations affecting its binding authority are that it was influenced by *In re Mill's Estate* (15), which is explained by the English decisions to be irrelevant where costs

(1) 5 P. D. 123.
(2) [1891] A. C. 649.
(3) [1891] A. C., at p. 470.
(4) 3 New Irish Jurist, 175.
(5) [1904] A. C. 817.
(6) [1904] A. C. 282.
(7) [1895] A. C. 89.
(8) [1911] 2 I. R. 260 (Palles C.B.)
(9) [1915] A. C. 599.
(10) [1915] A. C. 573.
(11) [1918] 2 I. R. 467.
(12) [1916] 1 I. R. 88.
(13) [1902] P. 42.
(14) [1902] 1 I. R. 63.
(15) 34 Ch. D. 24.

are expressly regulated by statute. The Act of 1890, c. 44, and the decisions thereon were not brought before the Court in *Madden's Estate* (1). Finally, the authorities, since that case, as to costs to and against the public officer or department, which cannot be explained by mistake or oversight, culminating in the last House of Lords' decision, negative the supposed rigid rule of law, which, if it exists, should be enforced in all divisions of the Court, and would reach the supreme tribunal itself. The circumstances which justify an order for costs must be collected from the reported cases illustrating the developments of the practice.

The following appear to be such circumstances. If the Attorney-General had sued out the writ, he could have unquestionably got costs. He could have intervened at any stage, as in *The Archbishop of Canterbury's Case* (2). The objection is, therefore, as to form and regularity of procedure, and comes within the reasoning in *Callender's Case* (3), which, if cited in *Madden's Estate* (1), would have possibly induced Lord Justice FitzGibbon to decide otherwise, as I would suspect from the conclusion of his judgment.

The writ is at the suit of a public departmental designated officer to recover money of the State. The claim is resisted on unsustainable grounds by the defendants, who submitted to deductions for many years, and who now dispute it only when direct payment is sought to be enforced. The conduct of the defendants and the untenable defence attempted are relevant factors. They ought not to be allowed (if there is jurisdiction), by escaping costs, to diminish the money belonging to the nation.

An order can and ought to be made for the above reasons. If such order was without jurisdiction, it would be appealable without leave; but leave to appeal would be necessary if the order was impugned as contrary to established judicial principle, or as not supported by recognized appropriate grounds. The Court will, therefore, give leave to appeal, as important matters of principle are supposed to be involved.

Solicitor for the Crown: *The Chief Crown Solicitor.*
Solicitor for the defendants: *John M'Cormick.*

H. J. M'C.

(1) [1902] 1 I. R. 63. (2) [1902] 2 K. B. 503. (3) [1891] A. C., at p. 470.

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Dec. 9, 10, 11, 17.

KEYS *v.* KEYS (1).

Practice—Alimony—Action to recover arrears of.

Arrears of permanent alimony payable under an order of the High Court of Justice in Ireland, King's Bench Division (Matrimonial), cannot be recovered by action.

Nunn v. *Nunn* (6 L. R. Ir. 115, and 8 L. R. Ir. 298) discussed and distinguished.

Held also, that the action was an abuse of the process of the Court.

MOTION FOR JUDGMENT.

This was an action brought on a specially endorsed writ to recover the sum of £855 8*s*., being eleven years' arrears of weekly permanent alimony payable under an order made by Mr. Justice Andrews in the matrimonial matter of *Keys* v. *Keys* (2), parties hereto, on the 25th February, 1901.

The curial portion of Mr. Justice Andrews' order was as follows:—

"It is ordered by the Court, both parties so consenting, that the respondent do pay to the petitioner permanent alimony at the rate of 30*s*. a week from the 17th December, 1900, to be paid weekly. First payment of 30*s*. to be made on Monday, the 4th March, 1901, and subsequent payments of 30*s*. on each following Monday, the arrears of said alimony to be paid within fourteen days from this date."

The plaintiff having failed in a motion for final judgment, the action went for trial before Mr. Justice Moore, sitting without a jury, who reported as follows:—

"As a good many authorities were cited, and as the case was one which appeared to be largely dependent on matter of argument, and as I was rather impressed with the dicta, cited at the Bar, of the Lords Justices of Appeal in *Bailey* v. *Bailey* (3), that such an action would not lie, I found the facts as under, and gave liberty to the parties to move as they might be advised.

(1) Before GIBSON, MADDEN, and KENNY JJ.

(2) Not reported.

(3) 13 Q. B. D. 855.

"I find that arrears of alimony under the order are due for the first six years immediately prior to the 16th May, however enforceable. That the order has never been altered, amended, or discharged. That the maintenance of the children was not a condition on which the alimony was made payable. That there never was any agreement by which the plaintiff waived or abandoned her claim under the order. That, considering the defendant's circumstances, the plaintiff was not guilty of laches. That, in fact, there was no estoppel as alleged in paragraph 5 of the defence, as the subject-matter of the prosecution in the Police Court was not the enforcement of rights under the order, and no other proceedings were proved.

"There was really no contest about any of the above findings of fact, some of which are based on admissions at the Bar."

Lowry, for the plaintiff:—

The question in the case is whether an action lies in Ireland for arrears of permanent alimony. The alimony was paid to my client for several years under the order of Mr. Justice Andrews. We are entitled to bring this action for the arrears. *Nunn* v. *Nunn* (1) is a direct authority of the Court of Appeal, which, I submit, is binding on this Court. The plaintiff is entitled to judgment.

Bartley, for the defendant:—

The defences relied on are—1. No action is maintainable in Ireland on an order made by an Irish Court or judge for the payment of alimony. 2. The claim is barred by the Statute of Limitations so far as it includes items that accrued more than six years before the commencement of the action. 3. According to the practice in the High Court, following the practice in the Ecclesiastical Courts, not more than one year's arrears of alimony can be recovered by any process. 4. When an order for the payment of alimony has not been acted on for many years, the Court will not enforce payment of any arrears, but will leave the party claiming the alimony to apply to the Court to renew the order.

In England no action can be brought to enforce the payment of alimony: see Annual Practice (1919), pages 21 and 22. *Bailey*

(1) 6 L. R. Ir. 115; 8 L. R. Ir. 298.

K. B. Div. 1918.

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v. *Bailey* (1) is an express authority on the point. That was a motion for final judgment under Order XIV, rule 1. The Court of first instance decided that a claim for alimony pendente lite cannot be made the subject of a special endorsement. The principal ground of the decision was that an order for the payment of alimony pendente lite was not a final order; that the judge who made the order had complete control over the order, and could annul or alter it even in regard to arrears; and that if an action were allowed to be brought on the order, there would be a conflict of jurisdiction between the Divorce Court, which had power to vary the order, and the High Court, which had no such power. The Court of Appeal in this case decided not only that the claim could not be specially endorsed, but that no action could be maintained for the payment of alimony. The ground of the decision was that a special remedy having been given by statute to enforce payment of alimony, no other remedy was available. The remedy was given by sect. 52 of the 20 & 21 Vict. c. 85—"All decrees and orders to be made by the Court in any suit, proceeding, or petition to be instituted under authority of this Act shall be enforced and put in execution in the same or in the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution."

This remedy does not include a right to bring an action, as in ordinary circumstances an action at common law cannot be brought to enforce a decree of the Court of Chancery. In *Bailey* v. *Bailey* (1) the order was for the payment of alimony pendente lite; but in *Robins* v. *Robins* (2) Joyce J. held that the same principle applied to permanent alimony, and for the same reasons, viz., that the Court which made the order for the payment of alimony could annul or alter it, and had control also over the payment of arrears, and that an action was not one of the remedies prescribed by sect. 52 of the Matrimonial Causes Act, 1857, and that, although that section was repealed by sect. 1 of the Statute Law Revision Act of 1892, the repeal did not affect any principle or rule of law or equity. Section 5 of the Marriage Law (Ireland) Amendment Act, 1871, as to the enforcement of orders made by the Court for matrimonial causes and matters in Ireland,

(1) 13 Q. B. D. 855. (2) [1907] 2 K. B. 13.

corresponds with sect. 52 of the English Act, and, therefore, there should be no material difference between the law and practice in England and the law and practice in Ireland. The case relied on by the plaintiff is *Nunn* v. *Nunn* (1). In this case it was decided that an action might be maintained in Ireland on an order for alimony made by the Probate, Divorce, and Admiralty Division of the High Court of Justice in England. The Court of Appeal in Ireland decided that the order for alimony was a final order. This decision is in direct conflict with the decision of the Court of Appeal in England on the same point in *Bailey* v. *Bailey* (2). But this conflict is of no importance so far as the case now before the Court is concerned. In *Nunn* v. *Nunn* (1) the Irish Courts decided that the order was final, and being a final order of a foreign Court which could not be otherwise enforced, an action might be brought upon it in Ireland. The decision in *Nunn* v. *Nunn* (1) purports to be based on the decisions in *Henley* v. *Soper* (3), *Russell* v. *Smyth* (4), and *Henderson* v. *Henderson* (5), in which the orders or judgments sued on were made by foreign Courts, distinguishing *Carpenter* v. *Thornton* (6), in which the decree sued on was not made by a foreign Court; and in the three cases of *Henley* v. *Soper* (3), *Russell* v. *Smyth* (4), and *Henderson* v. *Henderson* (5) the principal ground of the decisions was that the judgment or decree sued on had been made by a foreign Court, and could not be enforced except by an action. In the present case the order made by Mr. Justice Andrews could have been enforced by attachment or in any of the other ways available for the enforcement of orders made by the Probate and Matrimonial Division. There was no need to bring an action. It is admitted that the only object in bringing an action was, if possible, to recover the arrears, that is to take the case out of the jurisdiction of Mr. Justice Madden, who would have control over the whole question as to the recovery of arrears. This is the very evil against which the decision of the Court of Appeal in England in *Bailey* v. *Bailey* (2) was directed. The defence of the Statute of Limitations

(1) 6 L. R. Ir. 115; 8 L. R. Ir. 298.
(2) 13 Q. B. D. 855.
(3) 8 B. & C. 16.
(4) 9 M. & W. 810.
(5) 6 Q. B. 288.
(6) 3 B. & Ald. 52.

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has been admitted so far as regards the items that accrued more than six years before action brought.

In the Ecclesiastical Courts alimony was directed to be paid for the express purpose of supporting the wife from week to week, or from month to month, as the case might be. In some respects it resembles pin-money. If the wife did not use it for the purpose for which it was intended, she was not entitled to get it for any other purpose. Accordingly, in ordinary circumstances, the Ecclesiastical Courts did not allow more than one year's arrears to be recovered: Browne and Powles on Divorce, 7th ed., p. 139; *Wilson* v. *Wilson* (1); *Robinson* v. *Robinson* (2). It was also the custom in the Ecclesiastical Courts not to allow any arrears whatever to be recovered in cases where the wife having got an order for alimony allowed the instalments to remain unpaid for several years. In such cases the wife had to apply for a renewal of the order, and on that application all the circumstances of the case might be considered: *De Blaquiere* v. *De Blaquiere* (3). When the Court for Matrimonial Causes and Matters was established in Ireland by the 33 & 34 Vict. c. 110, it was expressly enacted by sect. 13 of the Act that the proceedings in the new Court should be conducted in accordance with the principles previously recognized in the Ecclesiastical Courts in Ireland.

Cur. adv. vult.

GIBSON J.:—

This action, brought to recover £855 5*s*., eleven years' arrears of weekly permanent alimony under order of Andrews J. in 1901, is based on *Nunn* v. *Nunn* (4), which Mr. Lowry contends is conclusive that such action is maintainable, though he admits that all the subsequent English decisions are adverse to the competence of such action. Mr. Bartley argues that *Nunn* v. *Nunn* (4) does not apply; and that, in any event, only one year's arrears of the weekly alimony is recoverable according to the principles and rules as nearly as may be conformable to those of

(1) 3 Hagg, 329 (notis).
(2) 2 Lee, 593.
(3) 3 Hagg, 322.
(4) 6 L. R. Ir. 115; 8 L. R. Ir. 298.

the Ecclesiastical Courts, subject to the rules of the Matrimonial Court: 33 & 34 Vict. c. 110, sect. 13.

I shall deal with—1, the English statutes and case law; 2, our Irish legislation; then 3, examine *Nunn* v. *Nunn* (1), what it decided, and whether it is distinguishable or now binding; 4, consider whether the present action is not an abuse of the process of the Court; and 5, whether payment is confined to one year's arrears.

1. Alimony, a personal allowance for the maintenance of the wife, as to amount and as to terms discretionary, was governed by the recognized principles and rules of the Ecclesiastical Courts in England as well as in Ireland: 20 & 21 Vict. c. 85, sect. 22; and was given in cases outside the express statutory powers: *Goodden* v. *Goodden* (2). There were two kinds of statutory alimony. Under 20 & 21 Vict. c. 85, sect. 32, a gross sum might be given, or an annual sum for any term not exceeding the wife's life; payment might be secured by deed, and interim orders by way of payment of alimony or otherwise were authorized. Under sect. 52 all decrees and orders under the Act were to be enforced in like manner as orders and decrees of the Court of Chancery then might be enforced. The limiting effect of this section is illustrated in *Ivimey* v. *Ivimey* (3). The other kind of alimony (not described as alimony but as maintenance) was founded on 29 & 30 Vict. c. 32, sect. 1 of which, prefaced by a preamble, authorized an order for maintenance during the joint lives of husband and wife of weekly and monthly payments, which order, if the husband afterwards became unable to make such payments, might be discharged, modified, suspended, or again revived. These enactments are now combined in the statute 7 Edward 7, c. 12. The procedure was governed by special rules and not by judicature rules, the application of which was expressly excluded by the judicature orders. Alimony, being personal, was inalienable save as to arrears: *In re Robinson* (4); *Watkins* v. *Watkins* (5); neither as to corpus nor arrears could it be extinguished by bankruptcy:

(1) 6 L. R. Ir. 115; 8 L. R. Ir. 298.
(2) [1892] P. 1.
(3) [1908] 2 K. B. 260.
(4) 27 Ch. D. 160.
(5) [1896] P. 222.

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Linton v. *Linton* (1); *Kerr* v. *Kerr* (2). Arrears of temporary alimony could not be recovered by action: *Bailey* v. *Bailey* (3); nor could arrears of permanent alimony: *Robins* v. *Robins* (4). These authorities have been accepted as settling the law in England. The weekly or monthly payments under the Act of 1866, subject to the control and revision of the Court, could not be described as debts arising on a final judgment: *Berkeley* v. *Elderkin* (5); *Patrick* v. *Shedden* (6); and the speech of Lord Watson; *Nouvion* v. *Freeman* (7). The judgment was defeasible. The finality of a judgment in legal quality must be ascertained by its character when made, and not by the accident of its being disobeyed or by subsequent circumstances: *In re Henderson* (8). Apart from absence of finality, the judicature orders not applying, no action lay to enforce the order: *Ivimey* v. *Ivimey* (9). Though, however, an order for weekly or monthly alimony was not a final judgment, it was enforceable by fi. fa., sequestration, elegit, committal under the Debtors Act, a receiver order as a form of equitable execution: *Thompson* v. *Gill* (10); possibly even by injunction; *Burmester* v. *Burmester* (11); and after the husband's death a year or so was allowed against his estate: *Brodrick* v. *Stillwell* (12).

2. Our Irish legislation and procedure are not quite the same. The principles and rules of the Ecclesiastical Courts are adopted as the foundation; but 28 & 29 Vict. c. 43 contains no such express provisions as occur in sect. 32 of the statute of 1857, or sect. 1 of the statute of 1866. Their place is taken by special Court rules (Wylie, pp. 965, 966). Sect. 2 of the 28 & 29 Vict. c. 43 makes the husband liable for necessaries if he fails to pay. Section 4 directs decrees and orders for alimony to be enforced in the same way as if judgments or orders of one of the superior Courts—not the Court of Chancery, as in sect. 52 of the English statute of 1857, adopted in 34 & 34 Vict. c. 49, sec. 5. Our judicature orders

(1) 15 Q. B. D. 239.
(2) [1897] 2 Q. B. 439.
(3) 13 Q. B. D. 855.
(4) [1907] 2 K. B. 13.
(5) 1 E. & B., at p. 809, per Lord Campbell C.J. and Wightman J.
(6) 2 E. & B. 14.
(7) 15 App. C., at p. 13.
(8) 20 Q. B. D. 510, per Lord Esher M.R.
(9) [1908] 2 K. B. 260.
(10) [1903] 1 K. B. 760.
(11) [1913] P. 76.
(12) [1916] 1 Ch. 365.

accordingly expressly incorporate in divorce procedure the orders as to execution, &c. Matrimonial rule 58 (Wylie, p. 966) allows alimony to be increased in favour of the wife, and to be diminished in favour of the husband by reason of his reduced faculties. The rule, even if not affected in application by the existing ecclesiastical principles of procedure, though less extensive than sect. 1 of the statute of 1866, would seem to deprive the alimony order of the character of a final judgment, though it may be enforced by any of the appropriate forms of execution, more extensive probably than those available in respect of an English order. Sect. 2 would support this view. Order XLII, rule 25, does not give a right of action on a non-final order any more than on an interlocutory order, though such order, like an interlocutory order as to costs, may be executed by fi. fa. There is no instance in Ireland before or since *Nunn* v. *Nunn* (1) of an action brought on an Irish alimony order.

3. Next, as to *Nunn* v. *Nunn* (1). It unquestionably decided that an English order under the Act of 1857 was as to arrears a final judgment, which, as it would have no effect in the form in which it was drawn unless an action could be brought in Ireland, was held to warrant and support such action. No reference was made to the Judgments Extension Act, which, if the alimony order was a judgment for a debt, might have been applicable. On this I express no opinion. I take up other grounds of distinction.

The order was obviously made under sect. 32 of the Act of 1857, which differs widely from sect. 1 of the statute of 1866. If Mrs. Nunn had had the alimony secured by deed, no difficulty might have arisen. The words, "until further order," might be read (though I do not think the Court so construed them) as not operating with the same effect as sect. 1. The action was for two quarters' alimony only. The Judges were apparently not informed that the English judicature rules did not apply to the Divorce Court. The result of this is strikingly illustrated by *Ivimey* v. *Ivimey* (2), where a final order as to costs in the Divorce Court was held not to support an action. This case is decisive that, having regard to sect. 52 of the Act of 1857, no action was competent.

(1) 6 L. R. Ir. 115; 8 L. R. Ir. 298. (2) [1908] 2 K. B. 260.

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A still more weighty point of distinction is that the English judgment was regarded as in substance the adjudication of a foreign Court, and as a foreign judgment which could only be made fruitful in Ireland by an independent action, though of course it differed from a foreign judgment proper, which would be proved as matter of fact by evidence. It is unquestionable that whether such judgment is final or not in character must be determined by the Court which makes the order: *Becquet* v. *MacCarthy* (1); *Frayes* v. *Worms* (2); *Nouvion* v. *Freeman* (3); *Pemberton* v. *Hughes* (4). When such Court decides that its order is not final, no extern tribunal can decide otherwise. Had the English decisions that an alimony order was not final, and that it would not support an action, been decided before *Nunn* v. *Nunn* (3), the Irish Court could not have overruled them. The circumstance that the decisions were pronounced afterwards cannot affect the result. The law must be taken to have been the same all through. *Nunn* v. *Nunn* (5), therefore, based on a mistaken conception of English law, cannot bind. As to the finality and actionable character of their own orders the English Courts were the supreme and sole judges. The recent interesting case, *Guaranty Trust Co. of New York* v. *Hannay & Co.* (6), deals with a different question—foreign law as depending on evidence.

A final distinction is that *Nouvion* v. *Freeman* (7) (see particularly the speeches of Lord Watson and Lord Bramwell), following *Berkeley* v. *Elderkin* (8), *Patrick* v. *Shedden* (9), and *Re Henderson* (10), shows that *Nunn* v. *Nunn* (5) is no longer law. The difficulty suggested by Lord Ashbourne and discussed by Lord Bramwell appears unanswerable. It is also mentioned by Grove J., in *Bailey* v. *Bailey* (11). If a terminable or defeasible order was treated as final and capable of supporting an independent judgment, the matrimonial judge would be unable to exercise jurisdiction over his alimony order, as such new judgment would create a fresh debt and liability. Order XLII, rule 28, would not supply

(1) 2 B. & Ad., at p. 957.
(2) 10 C. B. N. S. 149.
(3) 37 Ch. D., at p. 255.
(4) [1899] 1 Ch. 781.
(5) 6 L. R. Ir. 115; 8 L. R. Ir. 298.
(6) [1918] 2 K. B. 623.
(7) 15 App. C. 1.
(8) 1 E. & B., at p. 80.
(9) 2 E. & B. 14.
(10) 20 Q. B. D., at p. 510.
(11) 13 Q. B. D., at pp. 857, 858.

an adequate remedy, and no such remedy was applicable to the English order.

Supposing, however, that *Nunn* v. *Nunn* (1) may bind this Court—though it would not bind the Court of Appeal—I do not think it can be extended to such a case as that before us, where the alimony order was enforceable by ordinary execution. An erroneous decision is not to be followed out into logical developments. It is not like a statute.

4. This brings us to the question—Is this action an abuse of procedure? There is no precedent for it. If each week's or month's arrears, instead of being enforced by execution or committal order, was to found an action, the result would be indeed monstrous. To bring an action, the judgment in which would be enforceable in precisely the same manner as the order, would seem a shocking abuse of judicial forms: *Pritchett* v. *English and Colonial Syndicate* (2); Halsbury, vol. xviii, p. 219. Why was the action brought? The plaintiff was not examined in her own case. The only explanation given by her counsel was that an increased sum for arrears might be recovered. The explanation emphasizes the objection. After six years, execution could not issue on the order without leave of the divorce judge, which he might only grant on condition of limiting the amount of arrears. Supposing that there were only six years' arrears, the defendant might apply to the judge exercising his ordinary jurisdiction to reduce the payment or to restrict enforcement of the full arrears. If the practice of the Ecclesiastical Court in dealing with alimony, intended to provide for immediate personal maintenance and not to constitute an accumulating debt, was to limit arrears, it might well be that the divorce judge would interfere. In *Underwood* v. *Underwood* (3), and *Watkins* v. *Watkins* (4), some two years were allowed, but I cannot find any example of such arrears as here for six years and more being enforced.

A further objection, not mentioned at the Bar, has occurred to me. Leave to issue execution was required under Order XLII, rule 24, and no such leave was given. The action is probably

(1) 6 L. R. Ir. 115; 8 L. R. Ir. 298.

(2) [1899] 2 Q. B., at p. 435.

(3) [1894] P. 204.

(4) [1896] P. 222.

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founded on Order XLII, rule 25. Can an action be supported on an alimony order in such a dormant and unrevived condition? Would a judgment with a term prescribing a stay of execution be enforceable by immediate action? The position is quite unlike an appeal which may leave the decision appealed from immediately enforceable. An action, if maintainable, would get rid of the special protection given by rule 24, or by such stay. The remedy given by rule 28 would be inapplicable, and even if applicable, would be inadequate. Supposing that such action was theoretically competent, it would plainly be oppressive and unfair, being not only unnecessary, but intended to evade restrictions inherent in the original alimony order.

5. Though arrears of alimony were intended to be recovered promptly, and usually may have been limited to one year, there was no inflexible rule on the subject. The divorce judge, however, applying the principles of the Ecclesiastical Court, might possibly restrain enforcement of old arrears. Whether he could or should do so, the matter would be for his adjudication, subject to appeal. An action founded on the alimony order and tried before another judge would exclude any such controlling jurisdiction: the trial judge could only deal with the legal weekly debts. The two last sections of this judgment are not touched by *Nunn* v. *Nunn* (1), the reasoning in which tends indeed to support them.

As the action has been allowed to proceed to trial without any attempt to stop it or raise the questions now decided, and as *Nunn* v. *Nunn* (1) was not unfairly relied on for the plaintiff, we will dismiss the action, without costs and without prejudice to any right the plaintiff may have to enforce the alimony order by execution under Order XLII.

MADDEN J. and KENNY J. concurred.

Solicitor for the plaintiff: *T. E. Alexander.*
Solicitor for the defendant: *William L. Skelton.*

H. J. M'C.

(1) 6 L. R. Ir. 115; 8 L. R. Ir. 298.

THE KING (AT THE PROSECUTION OF THE LORD MAYOR, ALDERMEN, AND CITIZENS OF BELFAST) *v.* HIS HONOUR THE RECORDER OF BELFAST (1).

K. B. Div. 1918. Nov. 18, 19, and 21.

Public Health Acts—Repairs to street not repairable by inhabitants at large—Appeal against "requirement"—"Decision"—Order of Recorder allowing Appeal—Certiorari—Jurisdiction of Recorder to hear Appeal.

An appeal by a person aggrieved from a notice by a local authority under sect. 19, sub-s. 1, of the Public Health Acts Amendment Act, 1907 (7 Ed. 7, c. 53), requiring an owner to execute certain repairs to a street, lies to the Court of Quarter Sessions, and not to the Local Government Board.

CERTIORARI.

Application to make absolute a conditional order of certiorari obtained on the 25th day of June, 1918, and directed to His Honour the Recorder of Belfast, to remove into the King's Bench Division, for the purpose of being quashed, the order and adjudication of the said Recorder made at Belfast on the the 9th May, 1918, on the hearing of an appeal wherein Robert Esler was appellant, and the Lord Mayor, Aldermen, and Citizens of Belfast were respondents, whereby the said Recorder allowed the said appeal, on the grounds that the said proceedings and the said order were without jurisdiction and in excess of jurisdiction, inasmuch as no appeal lay to the said Recorder from the notice of the 28th March, 1918, the subject-matter of the said proceedings.

The facts appear sufficiently for the purpose of this report from the following affidavits of Mr. John W. A. Condlin, on which was grounded the application for the conditional order of certiorari, and of Mr. Robert Esler, filed to show cause why the order should not be made absolute.

Mr. John Condlin, managing clerk for the solicitor for the Belfast Corporation, in an affidavit made in support of an application on behalf of the Lord Mayor, Aldermen, and Citizens of Belfast to bring up and quash the order dated the 30th day of

(1) Before MOLONY C.J., and GIBSON and MADDEN JJ.

K. B. Div. 1918.

THE KING (BELFAST CORPORATION) *v.* RECORDER OF BELFAST.

April, 1918, stated that Robert Esler is one of the eighteen persons who are owners of lands and premises adjoining on the south side, Ardenlee Drive, a street within the municipal boundary of the city of Belfast which is not in charge of or maintainable wholly or partly by the said Corporation. The owners of the corresponding lands on the north side of Ardenlee Drive having made and completed the moiety of Ardenlee Drive immediately adjoining their premises, the Corporation, acting under the provisions of their local private Acts, served notice on Robert Esler, and the other owners on the south side of said street, to make and complete the corresponding moiety of Ardenlee Drive immediately adjoining their said lands and premises, and such last-mentioned owners, availing themselves of the provisions of local Acts, appealed against such order to the Recorder of Belfast, who by order dated the 24th day of October, 1917, allowed such appeal and discharged the order of the Corporation on the ground that it was unjust and unfair to such owners. The Ardenlee Drive being thus left completed in part only became dangerous to passengers and vehicles using it, and, in consequence of representations made to them to that effect, the Corporation, in pursuance of their powers under the Public Health Act, 1907, sect. 19 (which by order of the Local Government Board, made on the 21st day of July, 1910, was declared to be in force within the district of the Corporation), gave notice in writing to Robert Esler and all the other adjoining owners requiring the said Robert Esler and other owners to execute the repairs to such street specified in a notice dated the 28th March, 1918, served on Robert Esler on 2nd day of April, 1918, and on the other owners on same day and subsequent days. Robert Esler thereupon on the 10th April, 1918, served on the said Corporation a notice in writing dated 8th April, 1918, to the effect that he appealed against the order or notice dated 28th March, 1918, to His Honour the Recorder of Belfast, on the grounds that the order was unjust, unfair, and illegal, and that the repairs were unnecessary, and on 18th April, 1918, Robert Esler served on the Corporation a further notice that he intended to prosecute the said appeal. The matter came to hearing before the Recorder of Belfast on 3rd May, 1918, in the presence of counsel for

Robert Esler and counsel for the Corporation, and before it was opened or gone into, counsel for the Corporation raised the preliminary objection that the Recorder had no jurisdiction to hear or determine it, inasmuch as no appeal lay to said Court in respect of the notice of 28th March, 1918. Such preliminary point was argued at some length by counsel, and eventually the Recorder ruled that he would hear the matter. On the 9th day of May, 1918, the Recorder delivered judgment in favour of Robert Esler, and made an order allowing the appeal, setting aside the notice, and ordering the Corporation to pay costs and expenses.

Robert Esler in an affidavit sworn by him stated that he and the other appellants were owners of houses in Ardenlee Avenue with gardens in the rear. These gardens were described in the leases as being bounded in the rear by property of the Marquis of Downshire. The said gardens did not abut on the Ardenlee Drive, as passed by the Belfast Corporation, but the Drive was laid out close to our gardens without any notice to us and without our consent. The Corporation alleged that we could build on our gardens houses facing Ardenlee Drive, but in many of our leases there was a restrictive clause prohibiting the erection of any such buildings without the consent of our lessors, and the Corporation sought to make us contribute to the making of a street which was no benefit to us. One side of Ardenlee Drive is built upon with dwelling-houses, and the portion of the said Drive next houses is partly made, and is utilized by the occupants of such houses and for traffic, but it has lain in the state it is in for a long time, but it is not in such a state as the Corporation aver.

On the 28th day of March, 1918, Belfast Corporation issued a notice under the Public Health Acts Amendment Act, 1907, section 19, requiring me with all the owners on both sides of the Ardenlee Drive to execute before the 11th day of April, 1918, the following repairs:—"level depressions in carriage way with macadam coated with gravel"; and further stating that if before the said last-mentioned date the said repairs were not executed the Corporation would execute the same, and proceed to recover summarily the cost of the said repairs from the owners in default in manner provided by said sect. 19.

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On the hearing of the appeal it was contended by me that the order or requirement of the Belfast Corporation for alleged repairs was not bona fide, but an attempt to get round the decision of the learned Recorder in the previous case, as set out in paragraph 3 of this affidavit, and to obtain under the guise of "Repairs" an order to make the street (which they had previously failed to obtain). The demand made upon me and the adjoining owners was not a bona fide claim for repairs. After a full hearing, His Honour reserved judgment, and subsequently delivered the following written judgment, which is a true copy of the official judgment supplied to my solicitor by the Clerk of the Crown and Peace.

JUDGMENT.

"Ardenlee Drive is an unfortunate street, and I am sorry for the respectable persons who occupy the houses which front on it. The City Surveyor, giving evidence in Court a few days ago, described the street as having been 'dangerous for three years past,' and why it has been allowed to remain so long in such a state I do not know. The first attempt to remove the street from its dangerous condition and complete it was by an order of the 1st July, 1917, made by the Corporation under their local Acts, which form, I may say in passing, a very good code. An appeal was taken from that order under sect. 97 of the local Act, 1878, to the only Court it could be taken to, and after very careful and lengthened consideration I made an order on the 29th October, 1917, setting the Corporation order aside for reasons then fully stated. The street remained, of course, all this time in the dangerous state described by the City Surveyor, and no step was taken to remedy this until the 28th March last, when a 'requirement' was served by the Corporation which is the subject of the present appeal. This requirement is framed under sect. 19 of the Public Health Act Amendment Act, 1907, and calls upon the frontagers to Ardenlee Drive to execute before the 11th April the works mentioned in a 'schedule of repairs,' and there described as 'level depressions in carriage way with macadam coated with gravel.' The above sect. 19 deals with repairs and repairs only. There are several grounds of appeal mentioned in the present notice of appeal, but it seems to me that

the only question before me at present is that of illegality, viz., on the ground that the Corporation by their 'requirement' are not really asking the frontagers to do repairs, but are calling upon them to make up a new street, and that therefore the work mentioned in the requirement is not repairs within sect. 19 at all. Before dealing with this question, I refer to the point made by counsel for the Corporation, who urged that no appeal lies to this Court, but only to the Local Government Board. This point arises under the 7th section of the Act of 1907, already referred to, which in one class of case gives an appeal to Quarter Sessions (that is in Belfast to the Recorder), and in another class to the Local Government Board. The view Mr. Thompson asks me to take would eliminate any appeal to Quarter Sessions, and would make the Local Government Board the sole tribunal for all questions dealt with in sect. 7. That in itself seems an impossible contention, and there is a clear and intelligible line drawn by the section itself which any lawyer can easily see for himself between the class of cases in which appeal lies to Quarter Sessions and the class that must go to the Local Government Board. One of the cases to go to the Quarter Sessions is the present case of a 'requirement' of a local authority under 'this Act.' Returning to the alleged illegality of the 'requirement,' it seems to me to be as plain as that two and two make four, that the work contemplated by it is not repairs at all but street construction, and very poor street construction at that. The City Surveyor said that the work contemplated might last twelve months. It is not possible to repair a street that does not exist, and Ardenlee Drive has never had a real street; it has had half a street, made also in a very imperfect manner, and what is sought to be secured by the requirement is the construction of the other half in the same manner. "I do not know why the Corporation elected to proceed under sect. 19, which, in my judgment, does not at all apply. They could have resorted as before to their own local Acts, and my order of 29th October, 1917, did not preclude them from so doing, or if they for any reason preferred to proceed under the Public Health Acts, sec. 28 of the Public Health (Ireland) Act, 1878, put at their disposal a plain and unembarrassed mode of procedure. I set aside the requirement on the grounds stated, with costs."

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R. F. Harrison K.C., and *H. M. Thompson*, for the prosecutors:—

The Public Health Acts Amendment Act, 1907, was applied to Belfast by an Order of the Local Government Board of the 21st July, 1910, acting under powers conferred on them by sect. 3 of that Act. Proceedings were brought under sect. 19 of the Act of 1907, which provides for temporary repairs of a street which is not a highway "repairable by the inhabitants at large," i.e., not in charge of the local sanitary authority. The expenses of such repairs may be—(*a*) recovered summarily as a civil debt from the frontagers; or (*b*) declared to be private improvement expenses.

The appeal section in the Act of 1907 (sect. 7) provides two alternative and exclusive methods of appeal—1, to Quarter Sessions, except in cases where the order of the local authority results in the exaction of expenses in either of above ways; 2, to the Local Government Board in cases where such expenses are or will be recoverable. Requirements of the class covered by 1 are appealable only to Quarter Sessions; those covered by 2 are appealable only to the Local Government Board, except in, for example, sects. 42, 48, and 94, sub-s. 7, where a special appeal to Quarter Sessions is provided for, though expenses are recoverable. Requirements of class 1 are, for example, the following: those in sects. 22, 38, 39, 43, 44, 53. From these the appeal is to Quarter Sessions.

Hanna K.C., and *William Beattie*, for Robert Esler, showing cause against the conditional order:—

The question is whether sub-s. 2 cuts down the ample right of appeal given by sub-s. 1 of sect. 7. Sub-s. 2 cannot do this, as this case does not fall within it because—(*a*) the notice served upon us is not a "decision" within the meaning of the section; (*b*) this portion of the sub-section only applies to cases where the local authority has under this Act the right to make an election as to whether the expenses are to be recovered summarily, or as private improvement expenses. Under sect. 19 no such power is given as regards repair expenses, which must be recovered summarily.

Sub-s. 2 has a proper subject-matter to act upon under this Act, as sects. 39, 40, 45, and 46 are instances in which an appeal to the Local Government Board must be taken.

The reading given to the section by Mr. Harrison would do away with all appeals under the first sub-section, as he reads "decision" as governing determination and requirement, and suggests that the case of *Reg.* v. *Local Government Board* (1) was wrongly decided. It is wrong to read the section disjunctively, as if cases of summary jurisdiction and cases of private expenses were cumulative classes, or two different classes.

[Authorities discussed:—*Thynne* v. *Local Government Board* (2); *Reg.* v. *Local Government Board* (1).]

Cur. adv. vult.

MOLONY C.J.:—

Under sect. 19, sub-s. 1, of the Public Health Acts Amendment Act, 1907 (7 Ed. 7, c. 53), where repairs are required in the case of any street not being a highway repairable by the inhabitants at large to obviate or remove danger to any passengers or vehicles in the street, the local authority may give notice in writing for the owners of the lands and premises fronting, adjoining, or abutting on the street, and may require the owners to execute within a time to be specified in the notice such repairs as are described in the notice. Sub-s. 2 provides that if within the time specified in the notice the repairs are not executed, the local authority may execute the repairs and may recover summarily as a civil debt the cost of the repairs so executed for the owners in default. Acting under this section the Corporation of Belfast served a notice on the 28th March, 1918, on Robert Esler and others, as owners of the lands and premises fronting, adjoining, or abutting on the street known as Ardenlee Drive, requiring them to execute before the 11th April, 1918, certain repairs to the said street as specified in the schedule to the notice. On the 8th April, 1918, Esler served a notice of appeal to the Recorder of Belfast against the requirement of the corporation, and on the 30th April, 1918, the appeal came on for hearing before the Recorder, who

(1) 10 Q. B. D. 309. (2) 32 I. L. T. 89.

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allowed the appeal, and set aside the requirement with costs. The corporation obtained a conditional order for certiorari to quash the order of the Recorder on the ground that it was not competent for him to entertain the appeal. Affidavits have been filed by Robert Esler showing cause against the conditional order, and the corporation now apply to make it absolute, notwithstanding the cause shown.

Robert Esler relies on the provisions of sect. 7 of the Act of 1907, which says that except where the Act otherwise expressly provides, any person aggrieved by (inter alia) any order, judgment, determination, or requirement of a local authority under this Act may appeal in the manner provided by the Summary Jurisdiction Acts to a Court of Quarter Sessions. It is admitted by the corporation that if this sub-section stood alone, the appeal would be competent, but they contend that the present case is outside sub-s. 1, and is governed by sub-s. 2. Sub-s. 2 is as follows:—[His Lordship read the section.] (1).

Mr. Harrison contends that the service of the requirement in this case was a decision or part of a decision within the meaning of the sub-section, and that, consequently, the only remedy which Esler has is that provided by sect. 268 of the Public Health (Ireland) Act, 1878, namely, an appeal to the Local Government Board. Sect. 268 is as follows:—[His Lordship read the section.] (2).

(1) Sect. 7, sub-s. 2, of the Public Health Act Amendment Act, 1907:—"Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority, under this Act, are empowered to recover in a summary manner any expenses incurred by them, or to declare the expenses to be private improvement expenses, sect. 268 of the Public Health Act, 1875, shall apply as it applies to cases under that Act, and sub-s. 1 of this section shall not apply in any such case, whether arising under the Public Health Act, 1875, or under this Act; but nothing in this sub-section shall extend to any case in which an appeal to a Court of summary jurisdiction in relation to any requirement of a local authority, or to such expenses, is expressly authorized by this Act."

Part 1 of this Act is applied to Ireland by sect. 2, sub-s. 2; and see sect. 14, sub-s. 8.

(2) Sect. 268 of the Public Health Act, 1878:—"Where any person deems himself aggrieved by the decision of the sanitary authority in any case in

An appeal under this section only lies where there has been a decision, but it is I think clear from *Reg.* v. *Local Government Board* (1) that the requirement of the Corporation in this case cannot be regarded as a decision within the meaning of the section. In *Reg.* v. *Local Government Board* (1) the question arose under sect. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 52), which so far as the requirements of the Act are concerned is practically the same as sect. 19 of the Act of 1907. In that case notice was given by an urban authority under sect. 150 to the owner of premises forming a street to pay part of the expense of paving it, and on his default the authority executed the work, and the surveyor gave notice of the apportionment of the expenses for which the owner was liable, and a demand was made by him for the amount, and it was held that the notice to pay, and the notice of apportionment, were not, but the demand of payment was, a decision within the terms of sect. 268, from which an appeal lay by memorial to the Local Government Board. In giving judgment in the Court of Appeal Lord Justice Baggallay said:—"I am unable to see on what ground it is alleged that there was any decision arising out of the notice to Mr. Taylor, that the urban authority deemed it necessary that

which the sanitary authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the Local Government Board stating the grounds of his complaint, and shall deliver a copy thereof to the sanitary authority; the Local Government Board may make such order in the matter as to the said Board may seem equitable, and the order so made shall be binding and conclusive on all parties; provided that if such order should repeal, in whole or in part, the decision appealed against, the Local Government Board, before making such order, shall afford to the sanitary authority opportunity of giving such evidence as it may desire in support of its decision.

"Any proceedings that may have been commenced for the recovery of such expenses by the sanitary authority shall, on the delivery to them of such copy as aforesaid, be stayed; and the Local Government Board, may, if it thinks fit, by its order direct the sanitary authority to pay to the person so proceeded against such sum as the said Board may consider to be just compensation for the loss, damage, or grievance thereby sustained by him."

(1) 9 Q. B. D. 600; 10 Q. B. D. 309.

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the street should be paved. There was no decision; they merely called upon him to pave it, which he was not bound to do, and which he would not do. When he refused and neglected to pave it, the urban authority were in no respect bound to do that which he refused to do. It was at their option if they thought fit to do it, and they did think fit, and they did do it. I am unable to see that there was any decision then from which under the 268th section Mr. Taylor could have appealed." Brett L.J. puts it still more pointedly at p. 322:—"What decision is it against which there is an appeal? We are driven, first, as it seems to me to sect. 268: 'When any person deems himself aggrieved,' it is not by any decision; it is not 'by any decision of the local authority'; but 'in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses,' that is, the expenses already incurred by them, 'to be private improvement expenses,' he may within twenty-one days after notice of such decision address a memorial to the Local Government Board. Now, the 'decision' is the decision described. It is a decision in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them. That seems to me, at all events, to shut out an appeal to the Local Government Board before expenses are incurred at all; therefore it shuts out the possibility of that first alleged appeal, namely, an appeal when the owner receives notice that he is called upon to do the work himself, because at that time no expenses have been incurred."

The word "decision" in sect. 7, sub-s. 2, of the Public Health Acts Amendment Act, 1907, must bear the same interpretation as in sect. 268 of the Public Health (Ireland) Act, 1878, and, consequently, it cannot be applied to the notice of requirement which was given in the present case.

It was further contended on behalf of Mr. Esler that an appeal under sect. 268 only applied where the local authority had a choice as to whether they would recover the expenses in a summary manner or declare them to be private improvement expenses, and that as there was no such choice under sect. 19, sect. 268 did not apply. I do not consider it necessary to express

any definite view upon this point, but assuming that Mr. Harrison's contention is right, and that the words are to be read distributively, it is clear that the contention of the Corporation must still fail, as there has been no decision, and the time has not yet come for a decision within the section.

The learned Recorder was, consequently, authorized to hear the appeal, and the cause shown must be allowed, and the conditional order for certiorari discharged with costs.

GIBSON and MADDEN JJ. concurred.

Solicitor for the prosecutors: *A. J. Lewis.*
Solicitor for Robert Esler: *W. G. Wilson.*

H. J. M'C.

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THOMAS CRUISE, Plaintiff; JOHN BURKE, Defendant (1).

(1917. No. 8588.)

Malicious prosecution—Reasonable and probable cause—Malice—Finding of jury.

In an action for damages for malicious prosecution, a jury found that the defendant honestly believed that the plaintiff was guilty of the offence with which he had been charged, but that the defendant was actuated by malice in prosecuting the plaintiff.

Held, that, the defendant's honest belief not being in the circumstances reasonable, the finding of malice was sufficient to entitle the plaintiff to succeed.

Motion for Judgment.

The action was tried before Gordon J., and a common jury of the city of Dublin on 19th, 20th, and 21st days of June, 1918. The report of the learned Judge set out the facts as follows:—

"The action was brought by the plaintiff to recover damages for alleged libel and malicious prosecution. The defence in respect of the libel was a denial that the defendant had written or published the words complained of, that they did not bear the meaning alleged in the statement of claim, and that they were written and published on a privileged occasion, and without malice, being contained in an information sworn by the defendant before a magistrate on a criminal charge against the plaintiff, under the honest belief that they were true, and that the charge was well founded. As to the malicious prosecution, defendant denied that he had not reasonable and probable cause for preferring the charge and taking the proceedings against the plaintiff, and stated that he did so without malice. He denied that the

(1) Before Madden and Kenny JJ.

prosecution had been determined in plaintiff's favour, or that he suffered any loss or incurred any expense. I refer to the pleadings.

"The defendant had sworn an information against the plaintiff, charging him with stealing some sheep the property of the defendant. On foot of this information a warrant had been issued, and the plaintiff was arrested. The defendant made a deposition before the magistrates at petty sessions respecting the charge. The magistrates refused informations, and the plaintiff brought this action.

"Gibson K.C., in stating the plaintiff's case, offered to strike out the claim for libel. O'Connor would not accept this, but asked for a direction, as the occasion was absolutely privileged. I said I would deal with the matter later. Gibson asked me to direct that there was no reasonable or probable cause for the prosecution. I said, before deciding what I would do, I would ask the opinion of the jury on certain questions of fact arising in the case. I asked Gibson what he relied on as showing malice, supposing the defendant honestly believed that the plaintiff had stolen his sheep. He said he relied on the previous charges about the ewe and other sheep, and statements in defendant's information which were not borne out in his evidence in this trial. Gibson agreed to a non-suit or judgment for defendant on the claim for libel. I read out the questions I proposed to put to the jury, and these were agreed to, except that Gibson asked me to ask a further question, as to whether the plaintiff had taken the sheep along Dr. Steven's land, as he and Byrne had sworn he did. I said I thought that was involved in the first question, as there was no suggestion of the sheep having been taken by any route other than that deposed to by plaintiff and defendant respectively. I understood Gibson to agree to this. There was no objection to my charge to the jury. I refer to the registrar's certificate as to the questions put to the jury and their answers. Upon a consideration of the whole evidence, and the answers of the jury to the first and fourth questions, I was of opinion that there was no reasonable or probable cause for the prosecution. Both parties asked for judgment on the claim of malicious prosecution; but having regard to the finding of 'honest belief,' and the nature of the

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evidence (if any) as to malice, I declined to give judgment for either party on this claim, and left them to apply to the Court as they might be advised.

"I gave judgment for the defendant upon the claim for libel."

The questions left to the jury and their findings were as follows:—

1st. Did the defendant see the plaintiff driving the defendant's sheep from the defendants' grazing lands into the grazing lands of the plaintiff's father? Answer, No.

2nd. Had the defendant's sheep been separated from the plaintiff's sheep when the defendant came to the plaintiff at Mettal's gate? Answer, No.

3rd. Did the defendant see that the sheep were so separated? Answer, No.

4th. Did the defendant take reasonable care to inform himself of the true facts in reference to the sheep? Answer, No.

5th. Did the defendant honestly believe that plaintiff had stolen his sheep? Answer, Yes.

6th. Was the defendant actuated by malice in prosecuting plaintiff? Answer, Yes.

7th. If your verdict is in favour of the plaintiff, to what damages is he entitled? Answer, £30.

Gibson, K.C. (with him *O'Byrne*), for the plaintiff:—

The finding that the defendant honestly believed in the charge made by him against the plaintiff is not inconsistent with the finding that in making it he was actuated by malice: *Moore* v. *Trulock* (1).

[MADDEN J.:—For example, a person might know that a certain type of offence had been committed, yet if his motive in prosecuting was to levy blackmail you say that the prosecution would be malicious?]

Gibson, K.C.—A finding of honest belief, where there is no evidence of malice, precludes any inference of malice from the absence of reasonable and probable cause, but it is otherwise where there is any evidence of malice: *Browne* v. *Hawkes* (2). In the present case, there is abundant evidence of malice in the

(1) 33 I. L. T. R. 62.

(2) [1891] 2 Q. B. 718.

defendant's antecedent threats, and, more important still, the evidence upon which the jury has found (finding No. 1) that the information sworn by the defendant before the magistrate was false in its most material particulars. Counsel referred to Clerk and Lindsell on "Torts" (1912 ed.), p. 711; Pollock on "Torts" (1916 ed.), p. 229: *Fitzjohn* v. *MacKinder* (1); *Duane* v. *Barry* (2); *Heath* v. *Heape* (3); *Farley* v. *Danks* (4); *Abrath* v. *North-Eastern Railway Co.* (5).

Joseph O'Connor, for defendant:—

Where the jury find that the defendant had an honest belief in the guilt of the plaintiff, a finding of malice can only be sustained where there is independent evidence of indirect motive, i.e., where there is evidence of a deliberate intention to abuse legal rights: *Browne* v. *Hawkes* (6). Here there is no such evidence; the antecedent threat only meant that the defendant would put the law in motion against the plaintiff on the first opportunity, and the finding of the jury on question No. 1 is consistent with the defendant having made a bona fide mistake as to the course taken by the sheep when they passed from his view.

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MADDEN J.:—

The action now before us in its present form is one for malicious prosecution. The plaintiff applies for judgment for £30 on the findings of the jury and on the ruling of the judge who tried the action, and the defendant also applies for judgment on the findings. The foundation of the prosecution was an information in which John Burke, the defendant, swore that he saw the plaintiff, Thomas Cruise, driving his sheep into land of the father of the plaintiff, and prayed for a warrant for his arrest. On that information Cruise was charged before the magistrates with larceny of the sheep, and Burke repeated the charge in his deposition. The case came before the magistrates, who refused information, and Cruise then brought the present action for slander and for malicious prosecution.

(1) 9 C. B. N. S. 505 (per Cockburn C.J., at pp. 531, 532).
(2) 4 L. R. Ir. 742.
(3) 1 H. & N. 681.
(4) 4 E. & B. 493, at p. 499.
(5) 11 Q. B. D. 440; 11 A. C. 247.
(6) [1891] 2 Q. B. 718.

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The findings of the jury are as follows:—[His Lordship read the findings].

The question before us is as to the effect of the findings of the jury that the defendant honestly believed in the truth of his allegation that the plaintiff had stolen his sheep, and at the same time was actuated by malice in prosecuting the plaintiff. The ruling of the judge was that the prosecution was brought without reasonable and probable cause. Although there was no motion to set aside the finding of the jury, we have gone into the question of the evidence in support of the finding, for if it had not been sufficient to support the finding of malice, the defendant would have been allowed to amend his notice of motion.

The law is laid down in clear terms in *Browne* v. *Hawkes* (1). Although the absence of reasonable and probable cause is some evidence from which malice may be inferred, the jury by their finding as to the honest belief of the defendant would have negatived any conclusion which depended solely on such evidence, and in the absence of any evidence of indirect motive the finding of the jury that the defendant was actuated by malice could not be supported. In the words of Lord Bramwell in *Abrath* v. *North-Eastern Railway Co.* (2), "To maintain an action for malicious prosecution it must be shown that there was an absence of reasonable and probable cause, and that there was malice or some indirect and illegitimate motive in the prosecution." In a subsequent part of the judgment these words occur: "If ever there was a necessity for protecting persons, it is in an action for malicious prosecution"; and he quotes Bentham where he says, "It is necessary for the benefit of the public that people when they prosecute, and prosecute duly, should be protected." I adopt what was said by Lord Bramwell on the great authority of Bentham, and for myself, when a jury have found honest belief in the mind of the prosecutor, I should require clear evidence in support of the conclusion that the prosecution was prompted by some motive on the part of the prosecutor other than a desire to discharge his duty to the public.

The evidence was two-fold. First, on the 3rd of June, in the previous year, a dispute had arisen about a lost sheep which the

(1) [1891] 2 Q. B. 718. (2) 11 App. Cas., at p. 250.

defendant insinuated that the plaintiff had taken. When the plaintiff denied that he had seen the sheep, the defendant, in a manner described as "tantalizing," by which I understand "aggravating," "told me I must have. I should have seen her. He kept going on. He said I would want to look out for myself; he would meet me another day." Now, that statement does seem of a threatening character; but if that evidence stood by itself, it would not be sufficient to sustain the plaintiff's case, having regard to the finding that the prosecutor honestly believed in the truth of his case. There must be malice or an indirect motive in the prosecution to enable the plaintiff to succeed. And this is supplied by the answers of the jury to questions 1, 2, and 3 submitted to them. From these it is clear that the threat was followed up by a prosecution supported by perjury. The importance of the answer of the jury to the first question rests on the statement on oath made by the defendant. The defendant had sworn that he saw the plaintiff driving sheep into the grazing land of plaintiff's father. The threat, taken together with the fact that a prosecution had been threatened before, and that when it was brought it was supported by perjury, sustains the finding of malice.

I am satisfied, therefore, that the judgment in favour of the plaintiff for £30 should stand.

KENNY J.:—

The trial of this action seems to have been conducted in accordance with the recognized rules. Questions of fact for the purpose of enabling the Judge to determine whether there was reasonable and probable cause for the charge made by the defendant against the plaintiff were left to the jury and duly answered, whereupon the Judge decided that there was an absence of such reasonable and probable cause. In addition, the jury found that the defendant, while honestly believing in the truth of his charge, was actuated by malice in prosecuting the plaintiff. The learned Judge abstained from giving judgment, and both parties now move, the plaintiff asking for judgment, or, in the alternative, for a new trial; while the defendant confines his application to one for judgment only. The plaintiff's alternative application for a new trial was abandoned at the bar. The case is one not by any

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means free from difficulty, and the questions presented for our consideration seem to be whether the finding of honest belief can be reconciled with the Judge's ruling as to reasonable and probable cause, or with the existence of malice; and whether there is evidence to sustain that ruling of the Judge and the jury's finding of malice.

Nothing can be better settled as the result of judicial exposition than that in an action for malicious prosecution the plaintiff, in order to succeed, has to establish malice on the defendant's part and absence of reasonable and probable cause for the charge made against the plaintiff. It is for the Judge at the trial, and not for the jury, to decide as to the existence of reasonable and probable cause, after he has taken the opinion of the jury on such controverted matters of fact as he deems necessary. It was evidently considered that the essential matters of fact in the present case were—1, whether the defendant's statements that he saw the plaintiff driving his (defendant's) sheep from defendant's lands into the lands of the plaintiff's father, and also saw them separated when he came to Mettal's gate, were true; and, 2, whether the plaintiff's statement that the defendant's sheep had been separated from those of the plaintiff when the defendant came to the gate was true. The jury found that these statements were not true, neither those of the defendant nor of the plaintiff. They also found that the defendant did not take reasonable care to inform himself of the true facts in reference to the sheep.

In these circumstances, was the trial Judge entitled as a matter of law to say that there was an absence of reasonable and probable cause for the accusation against the plaintiff? In considering the question, the factors presented to him were the findings of the jury that the defendant had not stated the truth when he deposed that he saw the plaintiff driving the sheep on to the land of the plaintiff's father, and had seen them separated at Mettal's gate; that the defendant had not taken reasonable care to inform himself of the facts; and, finally, that he was actuated by malice. With these materials for arriving at a conclusion, I do not think it would be possible for us to say that the learned Judge was wrong in his view that they all tended in the direction of establishing want of reasonable and probable cause. As against

that view there was the finding of honest belief. But honest belief must be founded on some sort of reasonable basis. In *Duane* v. *Barry* (1), Palles C.B., at the close of his judgment, in dealing with such a finding says that reasonable "belief" by the defendant in the guilt of the plaintiff was an answer to the action. An eccentric or fantastic belief, even though honest, would not fulfil such a defintion, and when it is found that there was no reasonable and probable cause for the prosecution, I think that finding stamps the defendant's honest belief as not being reasonable.

As to the finding of malice, the plaintiff relies on the character of the defendant's evidence in the case, and on the fact that the defendant had on a previous occasion made a somewhat similar charge against him. If the ruling as to absence of reasonable and probable cause be right, it in my opinion affords an additional ingredient. In the judgments of the Court of Appeal in *Browne* v. *Hawkes* (2), it is laid down that the absence of reasonable and probable cause is at least some evidence from which malice might be inferred. No doubt it was also there said that honest belief had negatived any inference depending solely on that evidence. Here the inference is supplemented and strengthened by the other findings of the jury and by the defendant's previous accusations and threat. I think, in the circumstances, the finding of malice cannot be disturbed.

A new trial is not now asked for by either party, and I concur in thinking that judgment should be entered for the plaintiff.

Solicitor for plaintiff: *J. H. M'Carroll.*
Solicitor for defendant: *J. M. M'Dowell.*

H. H.

(1) 4 L. R. Ir. 743.

(2) [1891] 2 Q. B. 718.

K. B. Div. 1918. Dec. 17. 1919. Jan. 27.

MARY LUBE PEART, Applicant; AMY L. C. BARRETT, GERTRUDE E. CALWELL, MARY A. CALWELL, HELEN L. CALWELL, IDA E. CALWELL, AND GEORGE P. STEWART, Respondents (1).

Town Tenants Act, 1906 (6 *Edw.* 7, *c.* 54)—*Compensation for improvements—Basis of assessment—Enjoyment by tenant of improvements—Discretionary power to reduce compensation—Building lease—Covenant to expend sum on buildings—Expenditure of greater sum—"Rent"—sect.* 1, *sub-s.* 2.

In 1835 lands were granted by a lease for lives containing a covenant by the lessee to expend £200 in building a house. This lease became vested in M., who, in 1878, granted a sub-lease of the premises to P., and in 1899 assigned his reversion to P. and the applicant; P. subsequently died, when the lease became vested in the applicant solely. The lease terminated by the dropping of the last life in 1915. P. in 1878 and 1879 had erected buildings on the lands of which the value at the termination of the lease in 1915 was £1800. The resulting addition to the letting value of the holding from 1878 until 1915 was £60 per year. The capital value of that addition was in 1915 £1200.

On a claim by the tenant for compensation for improvements under the Town Tenants (Ireland) Act, 1906,

Held, 1, That for the purposes of that Act, the lease was a building lease only as to the amount which the tenant covenanted to expend on building. 2. That the enjoyment by the tenant of the advantage of the improvements had not necessarily extinguished her right to compensation for them. 3. That the rent which the Court may take into consideration under sect. 1, sub-s. 2, is the rent payable by the tenant for the holding. 4. Compensation for improvements is limited to increased letting value, the result of such improvements.

Case Stated by Mr. Justice Pim for the opinion of the King's Bench Division upon the hearing of an appeal from a decree of the Recorder of Dublin, awarding the applicant £417 compensation under the Town Tenants (Ireland) Act, 1906 (6 Edw. 7, c. 54), for improvements.

The case stated was as follows:—

1. This is a case stated at the respondents' (landlords') request on an appeal to me from a decree made by the learned Recorder of Dublin, in an application under the above-named Act for compensation for improvements.

(1) Before Gibson, Kenny, and Moore JJ.

The applicant's (tenant's) application was brought on the 1st day of December, 1917. The applicant thereby claimed the sum of £1700 as compensation for improvements made by her or her predecessors in title on the holding. The landlords (respondents) served a notice of dispute on the 14th day of December, 1917. The case was heard on the 15th day of February, 1918, by the learned Recorder. The learned Recorder awarded the tenant the sum of £417. Both sides appealed against the decision.

2. Except as to the increase in the letting value of the holding directly attributable to the tenant's improvements, there was practically no dispute of fact in the case. My findings of fact will sufficiently appear in the following paragraphs.

3. The tenant held the premises under a lease dated the 7th day of July, 1835, which became vested in a Mr. M'Sheehy. On the 5th day of September, 1878, Mr. M'Sheehy made a sub-lease for twenty-one years to Dr. Peart, the tenant's father, which sub-lease contained an option to purchase the lessor's interest in the lease of 1835 for £700. The tenant in 1899 exercised this option, the assignment being dated the 13th day of May, 1899, and made to the tenant and present applicant. The lease of the 7th day of July, 1835, was for three lives, renewable from time to time as therein appears.

4. The landlords themselves had held under a lease dated 1st August, 1811, and certain renewals thereof, the last renewal being dated the 30th day of April, 1879. The last life in the said renewal was that of Lord Longford, who may be taken for the purposes of this case to have died on the 21st day of August, 1915. Accordingly, the tenant's interest in the holding determined on that date.

5. The holding consists of a house standing in its own grounds, approached by an avenue, and including the usual features displayed by a gentleman's residence. The curtilage, about 2A. 3R. 34P. statute in extent, included a tennis ground, and a lawn on which a cow was grazed.

6. There was no evidence to show what buildings were on the plot leased in 1835; and there was no evidence to show that before 1878 any buildings stood thereon except a cottage or small house. It seems to have been such a building as one would

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expect to find in view of the covenant to spend £200 on buildings contained in the lease of 1835.

7. The tenant's predecessor in title in 1878–1879 expended a large sum of money in building operations, the general design and result of which was to convert the cottage into a house of what is commonly called "the villa type." The actual value of the works then executed is set out in the schedule to the tenant's application, as are the figures of other items claimed. I am satisfied on the evidence that the figures are accurate, that those relating to expenditure in 1878 and 1879 are based on the cost of building materials at that date, and that the present cost of same would be twice or three times as much.

8. It was admitted that the improvements were suitable to the character of the holding, and added to its letting value. The tenant's witnesses swore that the present letting value of the premises is £90, the tenant paying taxes and keeping the premises in repair. One witness for the landlords, Mr. Adam, placed it as low as £60, tenant paying rates and taxes, and keeping in repair (repairs being estimated by him at £15 per annum); but the landlords themselves before the proceedings estimated that £65 per annum to a tenant paying all rates and taxes was not a full rent. I was satisfied on all the evidence that the rent of the holding reserved in the lease, £10 per annum, was somewhat low, but that £15 per annum is the full rent that could be expected for the ground without the buildings. I was also satisfied and find as a fact that the present letting value of the premises (which are at present let to a tenant at £75 per annum, with power to the landlords to resume a portion of the lands attached to the house) is higher than the landlords' estimate, and that the increase in the letting value is attributable practically in its entirety to the building done by the tenant's predecessor in title, Dr. Peart. This increase I estimate at the sum of £60 per annum, and the capitalized value thereof at £1200.

9. The improvements have been well maintained since their execution, and after a considerable amount of evidence had been given on the point, I was satisfied that the expenditure of a sum of £35 would leave the holding in an excellent condition for letting.

10. The landlords made an offer to the tenant of a new letting.

11. The tenant remained in possession until 1st December, 1917.

12. I varied the decree of the learned Recorder, and awarded the tenant £949 compensation, with costs and expenses.

13. It was contended on the tenant's behalf that she was entitled to a very substantial sum for compensation inasmuch as the landlords would now get, without any expenditure on their part, a considerable yearly income produced by the buildings erected by the tenant. It was further contended that the landlords would be able to enjoy this income immediately by reason of the good condition in which the tenant kept the holding, and also that this advantage had accrued to the landlords at an unusually early time owing to Lord Longford's death.

14. It was contended on the landlords' behalf that, having regard to the provisions of the Act directing that the Court in awarding such compensation to the tenant in respect of such improvements, may, in reduction of the tenant's claim, take into consideration the time during which the tenant may have enjoyed the advantage of the improvements, and the rent at which such holding had been held, the tenant had been fully compensated for any improvements made by her. In connexion with this argument Mr. Swayne, counsel for the landlords, pressed me very strongly to treat the tenant and her predecessors as having enjoyed the whole increase in the letting value due to the improvements as a profit rent which the landlords were deprived of from 1879 to 1915. He also contended that by reason of the length of time that had elapsed since the improvements were made the tenant's interests therein were exhausted. He put it that I should take into consideration the difference between the actual rent payable under the lease, £10, and the rent at which the premises could have been let after the improvements had been made, which the applicant put at £90 per annum, that on that basis the tenant since 1878 or 1879 would have been enjoying in reality a profit rent of £80 per annum, and that such a profit rent would, for that period of time, more than absorb the actual sum expended by the applicants or their predecessor, with interest at 4 per cent. or more.

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15. It was also contended for the landlords that a reasonable offer of a new tenancy had been made to and refused by the tenant. On this point I ruled that the offer was not an offer within the meaning of the Act at all.

16. Having considered the relevant sections of the Act, I formed the view that no system of assessing compensation is contained in the Act, and that, subject to the duty imposed upon me of awarding no greater compensation than the capitalized value of the increase in the letting value of the holding directly attributable to the tenant's improvements, my duty was to award such sum to the tenants as should fairly represent the value of the tenant's present interest in the property produced by her or her predecessors, which was being transferred to the landlord. I was of opinion that while I was bound to take into consideration the rent of the premises, and the time during which the improvements had been enjoyed, no hard and fast rule could be formulated for the application of these considerations, and that the effect of their application must vary in different cases; that the length of enjoyment particularly must affect the compensation to a much greater extent, for instance, where the improvements were enjoyed under a tenancy from year to year, and, as it were, with the landlord's assent, than where they were enjoyed under a lease; that the nature of the improvements (whether commercially valuable for a long period or a short one only) must be considered, and that the life of the improvement, having regard not only to its nature but to the tenant's further expenditure on its maintenance after it was made, must be considered in each case in the light of facts. It was contended on the tenant's behalf that I was not entitled to reduce the amount of the claim by reason of the tenant's long enjoyment, as the tenant held under a lease, and enjoyed the improvements under the contract of tenancy; but it appeared to me that the direction in the section was clear, and that the Legislature may well have intended to disregard the contract in this instance for the landlord's benefit, as in other instances it has done in the case of the tenant.

17. The method which I adopted, therefore, of arriving at a fair compensation for the tenant, was, first, to view the matter as

a transfer of so much rent-producing property from the tenant to the landlord, then to find what the fair value or price of that property was, then to charge the tenant with any advantage derived from holding at a low rent, and also with the advantage which the tenant had enjoyed from the improvements for the period of time between 1878–79, when the improvements were made, and 1917, when the tenant left, and to charge the landlord with the difference.

18. I found that, at a moderate estimate, the present value of the buildings is £1800. I deducted from this the £200 expended under the covenant in the lease, leaving £1600. Taking into consideration that the tenant had paid £10 a year for property worth £15 a year, and had enjoyed the improvements since 1878, but that the tenant's occupation of the improvements has been such as to maintain them in an excellent condition from a letting point of view, I deducted from the said sum of £1600 one-third thereof, that is £533, leaving £1067. (There is no method by which an exact figure for this deduction can be ascertained. It is, and remains, a rough estimate.) From the time of Lord Longford's death until the 1st day of December, 1917, during part of which period nobody knew whether Lord Longford was dead or not, and during a further part of which negotiations for a sale or new letting of the property were proceeding between the parties, the tenant occupied the holding. For this period, although in a sense she had not remained on against the landlords' will, I charged the tenant £83. In estimating this amount I had regard to the letting value and to the probability that the landlords could have found a tenant. This left £984, from which I deducted £35, the sum necessary to prepare the premises for letting, and I awarded the tenant the balance, £949, which is much less than the capitalized value of the increase in the letting value attributable directly to the improvements.

19. It was contended for the landlords that the lease of 1835 was a building lease within the meaning of sect. 2, sub-s. 4, of the Act, so as to preclude the tenant from recovering any compensation. I ruled that the said section did not affect the tenant's right to compensation for improvements in excess of those made in pursuance of the covenant in the lease.

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20. The matters for the consideration of the Court are :—

(*a*) Is the tenant precluded from recovering compensation for the improvements claimed by reason of the lease of 1835 being a building lease within the meaning of the Town Tenants Act ?

(*b*) In view of the words in sect. 1, sub-s. 2, namely, "and the Court, in awarding such compensation to the tenant in respect of such improvements, may, in reduction of the tenant's claim, take into consideration the time during which the tenant may have enjoyed the advantage of the improvements, and the rent at which such holding had been held," was I bound to dismiss the tenant's claim because she and her predecessors in title since 1878 had enjoyed improvements made by them, which I find increased the letting value of the premises by £60 per annum during the whole period, even assuming that the head-rent paid by her ought to have been £15 and not £10 ? Or was I right in deciding that the rent at which the premises are held, and the period during which the tenant has enjoyed the improvements, are, but are not more than, elements which I was bound to consider with all the other facts of the case in arriving at such a sum for compensation as would render equitable the transfer of the improvements from the tenant to the landlord ?

(*c*) Is the rent, which under the terms of sub-s. 2 of sect. 1 is to be taken into consideration where the tenant holds under lease, to be compared with the full rent at which the premises actually let by the landlord could have been let by him (that is, without the improvements) ? Or is it to be compared with the rent that could have been obtained for the premises with the improvements ?

(*d*) Such directions (if any) touching the variation of any award as the Court may deem it necessary to give in view of the Court's decision in the above matters.

Jellett K.C. (with him *Swayne K.C.* and *H. Webb*), for the respondent :—

Under sect. 1, sub-s. 2, the Court "may" take into consideration the time during which the tenant may have enjoyed the advantage of the improvements ; but where the considerations are considerations involving matters of personal rights, "may" is not

permissive merely: *Julius* v. *Bishop of Oxford* (1); and the Court is bound to take that time into consideration. As regards the principle on which the amount of compensation is to be arrived at, there is no difference between the case of improvements made before the Act and those made after it. Sect. 2, sub-s. 5, shows that ten years is to be taken as the life of an improvement made before the Act; sect. 3, sub-s. 2, shows that twenty-five years is to be taken as the life of an improvement made after the Act, and it indicates the basis of computation; enjoyment for twenty-five years is to be taken as satisfaction of any right in respect of an improvement if made by the landlord; and the basis of computation must be the same when the improvement is made by the tenant. The case finds that the tenant has enjoyed the advantage of an increased letting value of £60 a year for almost forty years; that is, over £2000; it also finds that the capitalized value of the increased letting value is £1200; and, therefore, the claim cannot be sustained. The amount of compensation awarded has been arrived at on a wrong basis, that of the value of the improvements, which is found by the case to amount to £1800; the proper basis is the amount representing the increased letting value, which amount is found by the case to be £1200; under sect. 1 this amount of £1200 is the maximum amount which could be awarded.

The lease contained a covenant by the lessee to erect a house at a cost of £200, and is a building lease, and the case is outside the Act.

They referred to *Deane* v. *Stanley* (2); *Samuels* v. *O'Brien* (3).

Carrigan K.C. (with him *Swayne K.C.* and *Mac Cormack*), for the applicant:—

The Judge was entitled to take the value of the improvements as the basis of his assessment, provided that he did not award more than the capitalized value of the increased letting value. In a proper case, and having regard to all the circumstances, the Court is to consider the time of enjoyment. By the Landlord and Tenant (Ireland) Act, 1870, the Court "shall" take into consideration the time during which the tenant may have enjoyed the advantage of improvements; under the Town Tenants Act the

(1) 5 A. C. 542. (2) 45 I. L. T. R. 251. (3) 48 I. L. T. R. 249.

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Court "may" do so; this shows that the Court has a wide discretionary power in the matter. When the tenant holds under a lease he enjoys the advantage of his improvements as of right, and the Court may disregard his enjoyment. The amount of compensation may be measured by the amount expended on the improvements: see judgment of Sir E. Sullivan in *Adams* v. *Dunseath* (1) at p. 136. This is a building lease only as to the amount which the tenant covenanted to expend in building.

1919. Jan. 27.

GIBSON J.:—

There are three questions for consideration in this case—1, The construction of the Town Tenants Act as to compensation for improvements, and the nature and extent of the reduction allowed by reason of the tenant having enjoyed the advantage of his improvements, which in this case having been some forty years, the landlords contend must be taken to have satisfied the tenant's claim; 2, the construction of the Case Stated and its effect; 3, the application of the statute to the facts stated in the case, and the view of law therein taken by the Judge.

1. The statute was a new departure, and differs in many respects from the Act of 1870, and subsequent land legislation. Unlike sect. 5, dealing with loss of goodwill, sect. 17 confines claims for improvement to town holdings. Section 1, which gives compensation for improvements, applies to all lettings, existing and future alike (subject to certain special provisions applicable to future tenancies), and the duration of the lease or contract of tenancy is immaterial. The enactment deals with house property, which in cities like Dublin is subject to fluctuation in value from change of fashion or business advantages. House property once representing large expenditure and commanding high rents may as time goes on sink into an inferior position and find itself part of a slum. The object of the statute was not to give tenants the three F's, but to confer limited right of compensation for improvements and loss of trade goodwill; improvements, save permanent buildings before the Act, must have been made within ten years before the claim; the probable reason being the difficulty of proof or defence; there is no such restriction as to subsequent improvements guarded by sect. 3, which has no counterpart in the Land Acts.

(1) 10 L. R. Ir. 109.

computation. The reduction is not "compensation," though in certain circumstances the claim might be disallowed altogether. The Court is not required retrospectively to value the enhanced letting value resulting from the improvements when made, and then to treat the tenant's claim as completely or partially satisfied by having had the benefit of such enhancement. The discretion of the Court must be influenced by many varying circumstances. The tenant who built a return or stables might be succeeded by one who would find the buildings useless and even a source of expense, as he would be bound to keep them in repair. On the other hand, the improving tenant might sublet at a rent which would recoup his capital outlay with interest, in which case the Court might deem that the claim should be disallowed, or at least largely reduced. Two factors are specially mentioned as proper for consideration: the rent at which the holding has been held and benefits received from the landlord. No question arises as to this latter element, which might be illustrated by the landlord abating the rent or giving other benefits in consideration of the improvements. The rent spoken of is the tenant's contract rent, which if low would augment the value of the enjoyment of the improvements, and if a rack-rent would diminish it; the rise in value of the site from natural causes would be irrelevant in considering increased letting value, the direct result of improvements, and the enjoyment of such advantage.

The allowance under sub-s. 2 is for past enjoyment of advantages from improvements, not necessarily governed by any increase in letting value formerly. The letting value for forty or fifty years might vary intermittently. The deduction, whatever it is, for such past enjoyment is to come out of the present letting value assessment on the compensation claim.

It is, however, argued that, whatever might be the construction of sect. 1 standing alone, sect. 2, and particularly sect. 3, indicate that increased letting value is to be calculated retrospectively, and that where such advantage has been enjoyed by the tenant for twenty-five years and upwards he has got sufficient compensation.

Sect. 2, sub-s. 2, excludes compensation where before or after the Act the landlord has undertaken to make the improvement,

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and has not failed to do so. It is silent as to the terms of such undertaking whether in the lease or subsequently. The undertaking represents a bargain, and the matter is left to free contract between the parties. Sub-s. 4 excludes compensation in respect of a contract for value, including a building lease. As every building lease is for value, the latter words are redundant or ex abundanti cautela. The tenant urges that, if the lease was a building lease, it was only such as to the £200 building which was to be erected, but that it was not a building lease so far as related to buildings subsequently put up by the tenant of his own free will, which, suitable to the character of the holding, improved its letting value. I agree with this. If a lease by which the tenant agrees to erect a cottage may be a building lease so far as relates to that cottage, it does not take independent improvements out of the compensation clauses. The ground is not sterilized for the purpose of new improvements outside the contract. Sub-s. 5, creating a time limitation as to improvements before the Act, does not help the defendant. Future improvements are left entirely at large. Sect. 1 applies to both classes of improvements, and I have suggested the reason why antecedent improvements were subjected to special treatment. Sect. 3, sub-s. 2, was the provision mainly relied on by Mr. Jellett. It is confined to future improvements which sub-s. 1 controls by conditions. It is unlike sec. 2, sub-s. 2, which leaves the matter to agreement between the parties. After litigation has begun, it enables the landlord to undertake (that is make a binding offer accepted by the Court, for a contract with the tenant would hardly require special authority) to execute the specified improvements and to charge the tenant when the outlay is incurred with a sum not exceeding 5 per cent. per annum. This is treated as a kind of loan against the holding, and the interest continues till the tenancy ends. The tenant is given an option of re-paying the landlord by instalments which with interest at 3 per cent. will re-pay the outlay in twenty-five years. A lessee for a short term would obviously be likely to prefer the former alternative, a lessee for a long term the latter. But whether this term was short or long, twenty-five, thirty, or sixty years, the lessee might not think it his interest to accept liability for heavy annual instalments. He is left quite free to

act as he thinks best. So is the landlord free; he may not give any undertaking. The election given to the landlord to undertake and to the tenant to pay by instalments does not apply to existing improvements, and sub-s. 2 does not alter the legal aspect of sect. 1, sub-s. 2. The tenant paying instalments will be buying off the landlord's advance, and would thereby become owner of the improvements paid for by him in full.

Sect. 4 puts the mesne landlord who gets no personal use of the improvements in the same position as the improving tenant for the purpose of compensation.

Sect. 5 (as to loss of good will) confines its operation in case of tenancies created after the Act to lettings of a particular class, and in case of tenancies before the Act to holdings at a rent under £100 a year. Neither restriction applies to claims under sect. 1.

2. Next, as to the effect of the case stated. Usually such a case is intended finally to determine the litigation and assumes one of two forms. The facts are stated, questions of law propounded, and the Court is asked to answer the questions and to decide on the facts and answers whether the order under appeal should be affirmed, reversed, or varied. Another form is where the Judge who states the questions of law himself in the case directs that according to the answers the order below is to be affirmed or reversed. There is, however, another type of case in which to enable him to decide finally, the Judge invites the opinion of the Court on questions of law, his determination meanwhile being provisional and capable of modification. In some circumstances the last course is desirable, as in a recent case stated by Lord Justice Ronan as to good-will. My brother Pim has not only found the facts, but has set out the method and principle of his assessment, and having regard to questions (*c*) and (*d*), I interpret the case as one of the last type. In addition to questions (*a*) and (*b*), which might determine the result finally, he desires to be informed in dealing with his provisional award what is the meaning of rent, and whether his award should be varied. Unless the case is so construed, paragraph 18, stating the calculation and principle of the proposed award, would be redundant and unmeaning.

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3. The Court cannot travel outside the findings of fact, which are conclusive. Paragraph 8 states that the letting value was increased, that is at the date of the claim, by £60 a year; there was a rise or natural increase of site-value from £10, the rent, to £15. As this increase was not owing to improvements, it ought not to be allowed to enter into the calculation. The tenant gained by it during his tenancy, and that was all. The capitalized value of the £60 is found to be £1200—twenty years' purchase. That would be the maximum of compensation. How many years' purchase of the increased letting value should be charged against the landlord by way of compensation depends on many considerations: the age and durability of the buildings, the cost of repair, the prospect of always securing tenants at the enhanced rent, the nature of the neighbourhood as regards progressive or declining character. The case does not find that the maximum of £1200 should be allowed. The figure is apparently dealt with as a collateral restrictive condition which cannot be exceeded though not forming the basis of estimate.

Paragraph 18 describes in detail the method by which the sum of £949, the proposed award, was reached. Taking the present value of the buildings at £1800, deducting £200, contracted to be spent under the lease, from the balance, £1600, the judge made a deduction by reason of the tenant only paying £10 for property worth £15 a year; and, the improvements having been maintained in excellent condition, he reduced the £1600 by one-third for the benefit of enjoyment—£533—leaving £1067. From this two further sums, £83 and £35 (which need not here be dealt with), were taken, and the net proposed award is £949, described as much less than the capitalized value of the increased letting value, £1200. I regret that the method adopted does not seem to me in accordance with the construction of the statute, as explained in the earlier part of this judgment.

To a trifling extent it is clearly erroneous. The rise of £5 in the value of the site (apart from improvements) did not enter into the account. The rent which is to be considered under sect. 1, sub-s. 2, is the contract rent, not the rent at which the premises might, if untenanted, have been let. What is spoken of is rent, not site-value.

A more serious objection arises on sect. 1, construed as already explained. The compensation is to be for the increased letting value resulting from the improvements at date of claim. There were two questions for decision: 1, what was the increased letting value, and should the maximum of such capitalized value, or some less sum, be allowed? 2, what reduction should be made in respect of enjoyment of the improvements, having regard (inter alia) to the rent paid? The proposed award, as explained in paragraph 18, pivots on value of buildings, and treats the £1200 as only limiting the assessment on such value. The value of the buildings is, however, only relevant as regards the increase of letting value and allowance under sub-s. 2. It is such increase constituting gain to the landlord which alone can be subject of claim. To start with valuing the buildings as the basis of assessment is an inversion of the statutory method. Even if the judge might have arrived substantially at the same money result if he had applied the construction which I think correct (though I think it unlikely that the amount would not be considerably reduced), the figures £1067 and £949 do not allow the Court to readjust the award. We cannot say that he would have allowed the maximum of £1200, or if he did, whether he would have deducted one-third, or some less sum.

Mr. Jellett attacked the one-third as an arbitrary figure. Had no particular fraction been specified, and only a bulk sum stated, no criticism could have been advanced. On the question of fact the judge is supreme. Whether he allows more or less than we should ourselves think proper, his discretionary figures cannot be reviewed by this Court, which can only decide questions of law. The enjoyment is not compensation, and we cannot rule that compensation is extinguished as a matter of law. We cannot overrule the judge unless, on the facts found, his conclusion was erroneous in law.

The reference to the improvements having been maintained in excellent condition was misunderstood by Mr. Jellett. It is relevant as to the amount of compensation and letting value. The only question argued before my brother Pim was that the forty years' enjoyment of the improvements extinguished any claim. I agree with his view that in law it has no such conclusive

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effect. A decision the other way would have been final against the tenant; but the Judge's view left his proposed award open to correction. The points on which we differ from him were not brought to his attention; indeed, were not really argued before us.

The questions should be answered as follows:—

(*a*) No.

(*b*) As to the first alternative, No; as to the second, Yes.

(*c*) The rent in sect. 1, sub-s. 2, is the rent actually payable by the tenant under his expired lease, and is only material as regards the value of the tenant's enjoyment of improvements.

(*d*) The proposed award ought to be varied on the following principles:—the amount to be allowed for the additional letting value, resulting solely from improvements, not exceeding the capitalized value as a maximum, should be determined, and that sum should be reduced by the sum which the Judge in his discretion may allow for enjoyment by the tenant (including predecessors in title) of the advantage of such improvements, in which allowance regard should be had to the rent reserved under the lease. No question arises as to the sums of £83 and £35, which the judge held ought to be deducted from any award that he might make.

The case will be remitted to the learned Judge to vary his proposed award in accordance with the above answers.

KENNY J.:—

The 35th section of the Civil Bill Courts Procedure Amendment Act (Ireland), 1864, which authorizes a Judge of Assize to state a "special case" for the opinion of the High Court, expressly limits the question in respect of which the opinion is asked to one of law. By the two following sections the Court is empowered to exercise all the powers vested in the Judge of Assize in respect of such "special cases," and if necessary to direct an amendment of the case. The decision of the Court on the questions submitted is to be final and conclusive. If a decision were needed as to the interpretation of this section, it is to be found in the case of *M'Cormack* v. *Courtney* (1), where this Court held that its decision on a case

(1) [1895] 2 I. R. 97.

stated should be limited entirely by the restriction placed by the statute upon the power of the Judge of Assize, and that the findings of fact in the case must be accepted as final and conclusive, and the decision of the Court must be based on these findings. The result is that, while we may perhaps criticize and possibly disapprove of the findings of fact, we are, for the purposes of the "case," absolutely bound by them where they are the clear expression of the exercise by the Assize Judge of his discretionary powers. But if he accompanies his findings with a statement of the method by which he reached them, and this Court is of opinion that such method was wrong in principle, it seems to me that it would not be right for us to act on such findings, and thereby in a sense make the Court an assenting party to an act which it held to be not justified by law. In the present case I venture, with great respect, to think that, though my brother Pim has in respect of one of the questions submitted to us presented certain figures, they seem to me to have been reached on a wrong basis, and to be unsustainable in point of law. As to the other questions for our consideration, I do not experience any difficulty in answering them.

The 1st section of the Town Tenants (Ireland) Act (6 Edw. 7, c. 54) enables a tenant on quitting his holding to claim compensation from his landlord in respect of all improvements on the holding made by him or his predecessors in title which, at the date of the claim, add to the letting value of the holding and are suitable to the character of the latter, and have not diminished the letting value of other property of the same landlord, provided that the sum to be awarded shall not exceed the capitalized value of such addition to the letting value. It is plain that increased letting value must be the foundation of any claim under the section. The award of compensation is absolutely dependent on its existence. Not alone is it constituted the chief factor in ascertaining the compensation in the first instance, but it is also the only subject-matter of the limitation placed on the amount. The ultimate test of value is not the cost of the improvements, but what addition, if any, they have been the means of making to the letting value of the holding. If the Court be satisfied that there is an increased letting value attributable to the improvements and

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that the two other conditions in the sub-section are complied with, compensation is prima facie awardable. Otherwise, the tenant's claim falls to the ground. I entertain no doubt that though the section more than once speaks of "compensation" for improvements the reference is clearly to improvements that fall into the category of those that add to the letting value, and none other. On this question there has really been no controversy at the Bar, the arguments being mainly directed to the meaning and effect of the 2nd sub-section, which provides that the Court in awarding compensation may, in reduction of the tenant's claim, take into consideration the time during which the tenant may have enjoyed the advantage of the improvements and the rent at which the holding had been held and any "benefits" received from the landlord. No such "benefits" are claimed in this case, and the facts as to the two other considerations are shortly as follows:—The tenant's claim is made at the determination of a lease, dated the 31st August, 1879, for three lives, at a yearly rent of £10. That lease was a renewal, pursuant to covenant, of an original lease of the 7th July, 1835, which contained a covenant for the expenditure by the lessee within five years of a sum of £200 in building a good and substantial dwelling-house on the demised premises. The lease of 1879 determined by the death of Lord Longford, the last life, on the 21st August, 1915, the applicant having in the meantime acquired the lessee's estate by an assignment, dated the 13th May, 1899, in consideration of a sum of £700. The dwelling-house, which is the subject-matter of the claim, was then in existence, and, according to the tenant's claim, it had been built by a former tenant in or prior to 1878 or 1879 at a cost of £1978. The applicant's claim for compensation was, however, limited to £1700. The Recorder allowed £417 compensation, and Pim J. was of opinion the latter sum should be increased to £949. He has found that the rent of £10 was too low; that the ground rent should be £15; that the letting value of the premises is £75; and the increased letting value attributable to the buildings £60, the capitalized value of which he found to be £1200. It thus appears that the tenant and his predecessors in title have enjoyed the advantage of the improvements from the year 1878, a period of about forty years. The learned Judge's award has

proceeded on the basis of an enjoyment of that duration, and on the assumption that enjoyment by the tenant includes enjoyment by his predecessors in title notwithstanding the definition of "tenant" in section 18. I am of opinion that he is right in that construction. Otherwise the landlord could get no credit for the enjoyment by the tenant's predecessors, while the tenant could claim for improvements by them as well as by himself.

If the landlord be entitled to debit the tenant with these forty years' enjoyment of the increased letting value, and if the latter be a constant figure, it would amount to £2400, and if to that be added the amount of my brother Pim's award, the tenant and his predecessors will have received a sum of £3249 in respect of improvements which are alleged to have cost £1978, but in respect of which only £1700 is claimed, and this irrespective of the lessee's liability under the covenant to expend £200, and the low ground rent.

I now approach the question as to the method adopted by Pim J. in dealing with his award of £949. His starting-point is the value of the buildings, which he finds to be £1800—from which he deducts, in the first place, the £200 expended under the covenant, and, following that, he gives the landlord one-third of the balance, namely, £523, as representing the enjoyment of the improvements since 1878 and the low ground rent. Some small further reductions bring the balance to £949—the amount of his award. While not questioning the figures which the judge, in his absolute discretion, was entitled to find, it is impossible not to observe that the deduction of the £523 is a very haphazard operation. But the real defect in the method of calculation consists in the abandonment of the initial factor directed by the Act of Parliament, namely, increased letting value, and the substitution for it of the present value of the buildings. I do not think we could adopt such a departure from the main object of the statute, and I am of opinion the case should on this ground be remitted to the learned Judge. Perhaps when he bases his award on the increased letting value his figures may undergo considerable alteration and adjustment. The enjoyment of the advantage of the improvements has been of long duration, and, in my opinion, it is quite open to a Judge, should he so think

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proper, in a case under this statute to come to the conclusion that the enjoyment has extinguished the prima facie right to compensation, and to dismiss the claim.

Subject to these observations I am of opinion—

(*a*) that the lease of 1835 was a building lease only to the extent of the expenditure of £200, and does not preclude a claim in respect of a larger expenditure;

(*b*) that the judge was not bound to dismiss the claim, and that he was right in regarding the rent and enjoyment merely as elements which he was bound to consider with the other facts of the case; and

(*c*) that the rent to be taken into consideration under sect. 1 is the rent reserved in the lease.

MOORE J.:—

I concur generally with the judgments just delivered.

I answer the first question in the case by saying that if the lease of the 17th July, 1835, is a building lease within the meaning of the Act, it is so only quoad the improvements representing the sum of £200, which under the covenant in the lease the lessee was bound to expend, and not further or otherwise.

The statute, however, contains no definition of "a building lease," and I merely say that I do not bind myself to hold that the term, as used in this Act, must necessarily be governed by decisions upon the same words as defined in the Conveyancing Acts or Settled Land Acts, where, unlike the present Act, the fact of a lease being, or not being, a building lease necessarily affects conflicting interests between mortgagor and mortgagee, tenant for life and remainderman as to the power to bind the estate for a longer term than the interest of the lessor in possession may itself subsist.

As to question 2; owing to the proviso at the end of sect. 1, sub-s. 1, to the effect that the amount of compensation to be awarded shall in no case exceed the capitalized value of the addition to the letting value, I did for some time think that the primary basis of "the compensation" mentioned in the earlier part of the section must be found from a different source. This source I thought I had discovered to be indicated in the headings in columns 4 and

5 of the schedule to the prescribed form of claim, ultimately depending on the present capital value of the improvements, but having considered the judgment of Gibson J., which I have had the advantage of reading, I have abandoned this view for the reasons he has already stated, and in which I now concur.

As regards the power of deduction in sect. 1, sub-s. 2, I agree in holding that the Court in considering the amount to be credited for the time for which the tenant may have enjoyed the advantage of the improvements, is not restricted to the actual amount in moneys worth of the increased letting value enjoyed by the tenant. There may be other advantages from the improvements enjoyed by the tenant beyond their actual money value to a stranger as expressed in terms of the increased letting value, and I think that the Court exercising a judicial discretion may take into consideration all the circumstances connected with the relation of the tenant's enjoyment of the advantage of the improvements such as their nature and their personal and particular uses by the tenant.

On the other hand, if and when the annual enjoyment of the additional letting value in money's worth is brought as an element in favour of the landlord into the account against the tenant, as Mr. Swayne has argued, I think in justice to the tenant the latter must in that event equally be credited with the loss of annual interest on his expenditure on the improvements. This is the answer to Mr. Swayne's argument that mere enjoyment by the tenant for forty years has exhausted an annual additional letting value of £60 per annum. But, as I have said, I do not think the deduction should necessarily be taken on this somewhat restricted basis. I do not wish to add anything further to the judgments of the other members of the Court.

But I would like for myself to say that in my opinion this case is a striking instance of the hardships which may arise from retrospective legislation. The improvements in question were created forty years ago by a tenant holding under a lease of somewhat uncertain tenure depending upon the existence of a certain life, at an expense of £1,501 (the judge finds the claim at £1,700 (par. 1)). For myself I am satisfied that the tenant in the present case laid out this sum for his own comfort, never

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expecting to have one penny of it returned, and looking solely to his chances of enjoyment of the improvements during the term as his compensation. As a matter of fact such enjoyment continued for thirty-nine years.

Forty years ago, possibly in spite of the renewal, the landlord knew nothing of this outlay, and certainly (unless the improvements amounted to equitable waste) could not have either checked the expenditure or prevented the improvements, because as he was then under no liability to pay for them he had no interest in them. Now without his assent or concurrence, at the expiration of the lease, the little cottage contracted for at £200 under the lease is delivered to him transformed into a two-storied residential villa dwelling, with increased cost of repairs, increased burden of rating and taxation, and the necessity of finding from a more limited class a wealthier or more solvent tenant. Inasmuch, however, as the case finds these improvements are suitable to the holding, for this transformation the landlord is now compelled to pay. Under the statute, as Mr. Jellett has pressed on us, a landlord is well protected against such a contingency in respect of all improvements subsequent to the Act, for which his express consent must be obtained, or in the alternative the sanction of the Court; but as regards these prior improvements he is in very different case. This consideration should not and does not affect my mind in the construction of the Act, but I am glad to see, as pointed out by Gibson J, that the learned judge who states the case treats his own award as merely provisional, and though we have no control over his findings of fact, which are entirely within his judicial discretion, yet it may be that when the case goes back to him, on a resurvey of the evidence in the light of the guidance he has asked for from this Court, he may be able to arrive in his final award at some different conclusion of facts which will to some extent moderate the amount of the liability suggested by the case as imposed by the Act upon the respondents.

Solicitors for the landlords: *Montgomery and Chaytor.*
Solicitors for the tenant: *Terence O'Reilly & Sons.*

M. G. E.

R. (MAGINNIS) *v.* WATERFORD JUSTICES (1).

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Nov. 21. Dec. 19.

Friendly Society—Dispute—Rules—Decision of Justices—Jurisdiction—Right of Appeal—Friendly Societies Act, 1896 (59 & 60 *Vict. c.* 25), *sect.* 68, *sub-s.* 1; *Collecting Societies and Industrial Assurance Companies Act*, 1896 (59 & 60 *Vict. c.* 26), *sect.* 7.

The rules of a friendly society provided that all disputes between the society and its members "shall be determined by a Court of summary jurisdiction."

Section 68, sub-s. 1, of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), enacts that disputes "shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law or restrainable by injunction."

Section 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), provides that in all disputes a member may, "notwithstanding any provisions of the rules of the society or company to the contrary, apply to the County Court or to the Court of summary jurisdiction, . . . and the Court may settle that dispute according to the provisions of the Friendly Societies Act, 1896."

A dispute having been decided by justices in favour of a member, the society appealed from the decision to the Court of Quarter Sessions. The chairman and justices at Quarter Sessions dismissed the appeal on the ground that under the rules of the society, and sect. 68, sub-s. 1, of the Friendly Societies Act, 1896, they had no jurisdiction to hear it. The society applied for a writ of certiorari to quash the decision of Quarter Sessions.

Held, by the Court of Appeal (Sir James H. Campbell C. dissenting), affirming the King's Bench Division, that there was a right of appeal. Where jurisdiction is given directly by a statute to one of the ordinary tribunals of the country, such as a Court of summary jurisdiction, the Justices exercising the jurisdiction act not as arbitrators but as a Court, to whose decisions appeal and certiorari apply, unless excluded by express provision. Sect. 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, gives a statutory right of recourse to a Court of law with all its incidents, including the right of appeal.

APPEAL from an order of the King's Bench Division, dated April 30th, 1918, making absolute a conditional order of certiorari directed to the chairman and justices of Quarter Sessions for

(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

Appeal. 1918.

R. (MAGINNIS) *v.* WATERFORD JUSTICES.

Waterford City, to remove into the King's Bench Division, for the purpose of being quashed, an order made at Quarter Sessions on January 8th, 1918, dismissing an appeal from Petty Sessions, brought by the prosecutor.

Michael J. Maginnis, the prosecutor, was manager of the Waterford branch of the Royal Liver Friendly Society. On October 10th, 1917, a summons was issued and served on him at the suit of Anastatia O'Neill, mother and next friend of James O'Neill, a minor, the complaint being that a dispute had arisen between the parties as to the carrying out of the rules of the society in reference to a policy of assurance, whereby the sum of £13 0*s.* 10*d.* was assured to be paid at the end of ten years from July 13th, 1914. The complainant claimed a refund of the premiums which she had paid.

The summons came on for hearing at Waterford Petty Sessions on October 19th, 1917, and was determined by the justices in the complainant's favour.

Rule 172 of the society's rules provides that: "All disputes in Ireland between the society and any of its members shall be determined by a Court of summary jurisdiction in the place where the dispute arose." Sect. 68, sub-s. 1, of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), enacts that disputes "shall be decided in manner directed by the rules of the society or branch and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law or restrainable by injunction." Sect. 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), enacts that "in all disputes between a collecting society or industrial assurance company and any member or person insured, or any person claiming through a member or person insured, or under the rules, that member or person may, notwithstanding any provisions of the rules of the society or company to the contrary, apply to the County Court or to the Court of summary jurisdiction for the place where that member or other person resides, and the Court may settle that dispute according to the provisions of the Friendly Societies Act, 1896."

The defendant in the summons appealed from the order of the justices at Petty Sessions to the Quarter Sessions; and on

January 8th, 1918, the chairman and justices at Quarter Sessions dismissed the appeal on the ground that under rule 172 and sect. 68, sub-s. 1, of the Friendly Societies Act, 1896, they had no jurisdiction to hear it.

On the application of the defendant, as prosecutor, the King's Bench Division (Gibson, Madden, and Kenny JJ.) made absolute a conditional order for a writ of certiorari to quash the decision of the chairman and justices, and also granted a mandamus directing the chairman and justices to hear and determine the appeal according to law. The King's Bench Division held that the case was governed by *R.* (*M'Aneny*) v. *County Court Judge of Tyrone* (1). The complainant in the summons appealed.

O'Byrne, for the appellant:—

Under sect. 68 of the Friendly Societies Act, 1896, the decision given in manner directed by the rules of the Society, as in this case, "shall be binding and conclusive on all parties without appeal"; but the other side say that under the Collecting Societies and Industrial Assurance Companies Act (59 & 60 Vict. c. 26), sect. 7, which received the royal assent on the same day as the Friendly Societies Act, they have a right of appeal. Sect. 7, however, simply throws us back upon the Friendly Societies Act. The dispute in the case was decided in accordance with the rules of the Society, and a decision so given is, under sect. 68, sub-s. 1, final and conclusive. Therefore, sect. 7 has no application to a case where the rules give a member the right to have disputes determined by a Court of summary jurisdiction. The words "notwithstanding any provisions of the rules of the society or company to the contrary" in sect. 7 contemplate and are confined to cases in which there are, in fact, rules to the contrary. That part of sect. 7 which enables a member to apply to a Court of summary jurisdiction is consistent with the rules of the society in this case. The dispute here was determined by the justices as arbitrators. *R.* (*M'Aneny*) v. *County Court Judge of Tyrone* (1) is not an authority against the appellant, because in that case, so far as the report goes, there were no rules.

SIR JAMES H. CAMPBELL C. referred to *Callaghan* v. *Dolwin* (2).

(1) 44 I. L. T. R. 147.

(2) L. R. 4 C. P. 288.

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Swayne K.C. (with him *C. Power*), for the respondent:—

The effect of sect. 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, is to repeal so much of the Friendly Societies Act, 1896, as precludes the right of appeal. The Court of summary jurisdiction to which disputes may be submitted under the section is an ordinary Court, and not justices acting merely as arbitrators. Sect. 7 of the Collecting and Industrial Assurance Companies Act, 1896, is practically identical with sect. 30, sub-s. 10, of the Friendly Societies Act, 1875; and sect. 68 of the Friendly Societies Act, 1896, is substantially identical with sect. 22 of the Act of 1875. In *In re Royal Liver Friendly Society* (1) it was decided that there was jurisdiction under sect. 22 (*d*), and sect. 30, sub-s. 10, of the Act of 1875 to remove to the High Court by certiorari proceedings in an action against a friendly society by one of its members. Chitty J., at p. 336, says:—"That [sect. 30, sub-s. 10] again is a permissive section, giving the member the right to resort to the County Court, or to the Court of summary jurisdiction, but again not conferring exclusive jurisdiction on those Courts. The effect of the section is that if there should be found in the rules a provision ousting the jurisdiction of the County Court or of the Court of summary jurisdiction that provision is not to take effect against the statutory enactment. The statutory enactment, therefore, overrides any rule which provides that the member may not go to the County Court, or may not go to the Court of summary jurisdiction." The right conferred by sect. 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, overrides any rules of the society to the contrary: *Knowles* v. *Booth* (2). The case of *R.* (*M'Aneny*) v. *County Court Judge of Tyrone* (3) is a clear authority in support of the right of appeal.

O'Byrne, in reply.

Cur. adv. vult.

(1) 35 Ch. Div. 332.

(2) 32 W. R. 432.

(3) 44 I. L. T. R. 147.

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SIR JAMES H. CAMPBELL C. :—

The appellant in this case is a member of the Royal Liver Friendly Society, and a dispute having arisen between himself and the society, he brought it before the justices sitting in Petty Sessions as a Court of summary jurisdiction. That Court having decided the dispute in his favour, the society appealed from this decision in the form and manner prescribed by the Petty Sessions Act to the Court of Quarter Sessions. Upon the hearing of this appeal the objection was taken, on behalf of the present appellant, to the competence of the Court to determine it upon the ground that by reason of the provisions of the Friendly Societies Act (59 & 60 Vict. c. 25, sect. 68) the decision of the justices was binding and conclusive upon all parties without appeal. The County Court Judge decided in favour of this contention, and thereupon the society applied in the King's Bench Division for a writ of certiorari to quash this decision, and of mandamus, directed to Quarter Sessions, to hear and determine the appeal according to law. Both applications were granted by the Court in circumstances to which I shall hereafter refer, and the present appeal from this decision has been brought by the plaintiff, in the original complaint, before the justices. The question depends upon the meaning and effect to be given to the Friendly Societies Act, 1896, sect. 68, and the Collecting Societies Act, 1896, sect. 7, both of which Acts received the Royal Assent on the same day.

Section 68 of the former Act provides that every dispute between a member and the society shall be decided in manner directed by the rules of the society, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law, or restrainable by injunction. Sub-sect. 5 provides that where the rules of a registered society direct that disputes shall be referred to justices, the disputes shall be determined by a Court of summary jurisdiction, or, if the parties thereto consent, by the County Court. Sub-sect. 6 provides that where the rules contain no direction as to disputes, the member or person aggrieved may apply either to the County Court, or to a Court of summary jurisdiction, and

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such Court may hear and determine the matter in dispute; while sub-sect. 7 enables the Court, or domestic tribunal, in its discretion, to state a case, upon a question of law, for the decision of the Supreme Court.

In the present case, by rule 172 of the Society's rules, it is provided "that all disputes arising in Ireland between the Society and any of its members, or any person claiming through a member, or under its rules, shall be determined by a Court of summary jurisdiction in the place where the dispute shall have arisen." If the matter rested there it would seem to be certain that no appeal would lie from the order of the justices in the present case, inasmuch as they are the tribunal directed by the rules to determine the dispute, and by the section just referred to, their decision is to be final and conclusive without appeal. The society, however, contend that inasmuch as by the Collecting Societies Act, 1896 (59 & 60 Vict. c. 26), sect. 7, power is given to any member, notwithstanding any provisions of the rules of the society to the contrary, to apply to the County Court, or to the Court of summary jurisdiction, the appellant, in this case, must be treated as having made his application to the justices under the powers of the section, and that every decision by the Court which determines the matter thereunder must be subject, when it is a decision by a Court of summary jurisdiction under the Petty Sessions Act, to the ordinary incidents, including the right of either party to appeal. The complication in the present case is created by the accident that the tribunal selected by the rules of the society is precisely the same as one of the two alternative tribunals provided by this section 7 of the Collecting Societies Act.

It is contended for the appellant, upon the one hand, that the provisions of this section, in so far as they authorize an application to a Court of summary jurisdiction, are in agreement with, and not contrary to, the rules of the society; while for the society, on the other hand, it is argued that as a right of appeal is not excluded under sect. 7, its provisions are, to this extent, contrary to those contained in the rules under which, coupled with the provisions of sect. 68 of the first Act, the appeal is excluded. For reasons which I shall proceed to explain, it seems to me

that, upon its true construction, sect. 7 means, and only means, that in all cases in which a member is, under the rules of the society, prohibited from applying to a Court of summary jurisdiction or to the County Court, he may, notwithstanding this provision to the contrary, apply either to a Court of summary jurisdiction or to a County Court. This construction is not only fully consistent with the language of the section, but also is the only construction which does not result in palpable absurdity. The Legislature surely cannot have intended to say that where a member is, by the rules of the Society, bound to apply to a Court of summary jurisdiction alone, or to the County Court alone, or to either of these Courts, he shall, in addition, be entitled to apply to either of such Courts. To make my meaning clear, let us suppose a possible indeed probable, case in which the rules are identical with the section in providing that the application may be made either to a Court of summary jurisdiction or to a County Court. Could it possibly be contended that sect. 7 was of any force or effect in such a case in which it would be merely an echo of the rule itself, or could it be said that the rule was, in many respects, contrary to the section? Similarly, if the words "to the County Court" are omitted from the section, does it not become almost a verbatim repetition of the rule in the present case?

But it is said that the rule would still be contrary to the section, as the latter necessarily implies a right of appeal. This suggestion not only begs the question, but overlooks the fact that the rule in no way excludes the right of appeal, and that the exclusion is entirely the operation of sect. 68 of the first of these Acts of 1896. These Acts were passed on the same day, and therefore sect. 7 must be read as if it was incorporated in the first Act, as indeed it was in the previous Friendly Societies Act, 1875. So reading it, we find that by sect. 68, in all cases in which the rules provide for the settlement of disputes by a Court of summary jurisdiction, the decision shall be final and conclusive without appeal; and, if a subsequent section was to be found in the same Act enacting that where the rules of the society provided to the contrary, the member might, nevertheless, apply to a Court of summary jurisdiction, could these words possibly be construed as repealing the finality already given by a previous section to the

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decision of the Court provided by the rules, where such Court was identical with that prescribed by the later section? Whatever view is taken of the effect of sect. 7, I think it must at least be conceded that the tribunals thereby provided are in addition to, and not in substitution for, the tribunal or tribunals prescribed by the rules, so that in the present case the right of the plaintiff under the rules to apply to a Court of summary jurisdiction remains wholly unaffected; nor is there any provision to be found in either of the Acts of 1896 putting him to an election, nor any machinery enabling or requiring him to elect.

Assuming, therefore, that a member applies as plaintiff to a Court of summary jurisdiction, was it ever contemplated that he might assert, according to his interest in claiming a right of appeal for himself or denying it to his opponent, that his application to the Court was made under the rule and not under the section, or vice versa? or could the defendant in the same way plead this alternative contention according as it suited him? If so, upon what materials is the Court to determine such an issue between the parties? The form of complaint, the procedure, and the order of the Court will be identical in either view, and if the plaintiff who has originated the litigation asserts that he has applied under the rule or under the section, where is the jurisdiction to be found enabling the Court to contradict him, or upon what materials could any such jurisdiction be exercised? These are but some of the absurd consequences that must result once it is held that an application to the Court under the rule is without appeal, but if made to the same Court under sect. 7 is subject to appeal; whereas if the decision in every case in which the Court to which the application is made under the rule or the section is identical, is held to be final and conclusive, the conclusion is logical and free from absurdity. No precise authority upon the point has been cited in argument, unless it is to be found in the case of *King* (*M'Aneny*) v. *County Court Judge of Tyrone* (1). It was stated at the Bar that the judges of the King's Bench Division held in the present case that they were bound by that decision; but, with all respect, I am unable to follow their reasoning. The Court, as we were informed, had no information before them as to the facts

(1) 44 I. L. T. R 147.

in that case beyond what is to be found in the report in the Irish Law Times, and therefore they could not know, as we likewise during the argument did not know, the nature of the tribunal, if any, which the rules of the society prescribed for the settlement of disputes. In the absence of information on this point, it would not be possible for any Court to treat the case as deciding or concluding the question before us, for it must be obvious that unless the rules provided for the settlement of disputes by a Court of summary jurisdiction or by the County Court, the case had not the remotest bearing upon the one which we have to decide. It now turns out as a result of an examination of the affidavits in the case, undertaken since the hearing by counsel for the appellant at the request of the Court, that the society in question, the Prudential Assurance Company, had no rules of any kind providing a tribunal for the settlement of disputes. It further appears that the society in that case, the Prudential Assurance Company, was not a friendly society or registered as such, and I am at a loss to understand how the Friendly Societies Act applied. It would seem to me that the only point involved was whether in the case of a collecting society a decision under sect. 7 of the second Act was final, or whether it was subject to appeal, and this is to some extent borne out by the head-note. I cannot regard it, therefore, as any authority for a case like the present, in which the defendants were in truth and in fact a friendly society, and in which a rule did exist prescribing the tribunal for the settlement of disputes; and if it is to be regarded as expressly or by implication deciding the question mentioned in the case before us, I must decline to follow it.

The case of *Callaghan* v. *Dolwin* (1), to which I called attention during the argument, though decided upon a review of Friendly Societies Acts which have long since been repealed, seems to me to bear directly upon the question, and it is still cited in Halsbury's Laws of England, vol. xv, p. 182, as an authority for the following proposition:—"The decision of justices, in a case where the rules of a registered society direct that disputes shall be determined by them, is final and conclusive on all parties without appeal." I must refer to the case in some detail, as the material sections

(1) L. R. 4 C. P. 288.

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of the different Acts, which were under consideration, presented, in my opinion, a much more formidable case in favour of the right of appeal than any that can be based upon the two Acts of 1896.

The Friendly Societies Act (18 & 19 Vict. c. 63, s. 40) enacted that every dispute between a member and officers of the society should be decided in the manner directed by the rules of such society, and the decision so made should be binding and conclusive on all parties without appeal, but a proviso was added, that where the rules of a society have directed disputes to be referred to justices, such disputes should be referred to, and decided by, the County Court. The subsequent Friendly Societies Act (21 & 22 Vict. c. 101, s. 5) repealed this proviso which gave the jurisdiction to the County Court, and "in lieu thereof" it was enacted that, where the rules of any society shall direct disputes to be referred to justices, "they shall proceed to hear and determine the complaint in manner directed by 14 & 15 Vict. c. 93 (The Petty Sessions (Ireland) Act), and such justices may make such order thereupon, either for payment of money or otherwise, together with costs not exceeding 10*s.*, as they shall think fit." It will be observed that this later Act, while repealing the proviso to sect. 40 of the earlier Act (18 & 19 Vict. c. 63), left unrepealed the portion of the section which declared the decision to be final and without appeal, but, in the interval between the two Acts, was passed 21 & 22 Vict. c. 43, s. 2, which provided that after the hearing and determination by a justice, or justices, of any information or complaint which he or they have power to determine in a summary way by any law now in force, *or hereafter to be made*, either party might demand a case for the opinion of the superior Court. The law under which the justices got the jurisdiction to determine the complaint in *Callaghan* v. *Dolwin* (1), viz., 21 & 22 Vict. c. 101, s. 5, was therefore "a law hereafter to be made," and the jurisdiction to determine was to be exercised in manner directed by the Summary Jurisdiction Act (11 & 12 Vict. c. 43), subject only to a limit of 10*s.* on the costs. The magistrate made an order of conviction, but, on the application of the defendant, stated a case. Upon the hearing, his jurisdiction to do so was challenged on the ground that the "finality" clause of 18 & 19

(1) L. R. 4 C. P. 288.

Vict. c. 63, sect. 40, was not either expressly or impliedly repealed by either the combined or separate effect of 20 & 21 Vict. c. 43, s. 2, and 21 & 22 Vict. c. 101, s. 5; while it was contended, on the other hand, that these sections swept away the prohibition of appeal in the earlier Act, and *Reg.* v. *Lambarde* (1), which expressly so decided, was cited. The Court, overruling *Reg.* v. *Lambarde* (1), held that there had been no repeal of the finality clause of sect. 40 of 18 & 19 Vict. c. 63, and Montague Smith J., in delivering the judgment of the Court, said:—"If we were to hold that this appeal lies, we should attribute to the Legislature an intention opposed to the whole policy upon which, in this respect, the Friendly Societies Acts are founded."

Similar expressions as to the policy of these Acts will be found in the judgment of Loreburn C., in the House of Lords, in the case of *Catt* v. *Wood* (2). So recently as by the Friendly Societies Act, 1908, sect. 6, the Legislature effectively closed the gap which had been opened in this policy by a number of cases in which it had been held that where a society expelled a member in consequence of a dispute, he was not precluded, after expulsion, from applying to the ordinary tribunals by rules or legislation which only bound him as a member.

In adopting the decision of the County Court Judge, that no appeal lay from the order of the justices in this case, I base my conclusion upon the fact that the tribunal provided by the rules of this particular society was identical with one of the two alternative tribunals to which, under sect. 7 of the Collecting Societies Act, 1896, a member is entitled to apply, and I pronounce no opinion as to whether a right of appeal would exist had the complainant in this case applied to the County Court. It may be that the Legislature had in mind the possibility that the tribunal provided by the rules might be the Court of summary jurisdiction or the County Court, and, therefore, for the purpose of an effective alternative, with a right of appeal, enabled by sect. 7 the member to select either jurisdiction. It necessarily follows that, if the facts in *M'Aneny's Case* (3) resembled the present, I would dissent from the decision in that case, and decline to follow it. The decision appealed from should, in my opinion, be reversed, and the appellant be allowed the costs in both Courts.

(1) L. R. 1 Q. B. 388. (2) [1910] A. C. 404. (3) 44 I. L. T. R. 147.

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RONAN L.J.;—

I am of opinion that the judgment of the King's Bench Division should be affirmed.

The superior Courts of law and equity had, and the High Court of Justice now has, general jurisdiction to enforce all legal and equitable rights. Inferior Courts have a limited jurisdiction for the enforcement of certain rights. The parties to a contract may agree that disputes arising out of it shall be determined by any person or body they please. In a case of a society such as the present "the rules form the contract between the members and the society," per Lord Macnaghten: *Auld* v. *Glasgow Working Men's Building Society* (1).

Rule 172 is as follows:—"All disputes in Ireland between the society and any of its members shall be determined by a Court of summary jurisdiction in the place where the dispute arose." Such a form in a contract would not oust the jurisdiction of constituted legal tribunals having jurisdiction in the matter; but from an early date friendly societies statutes have contained the provision:—"Every dispute between a member . . . and the society shall be decided in the manner directed by the rules." It has been settled that this ousts the jurisdiction of every Court in the case of disputes within the section, unless jurisdiction is by the statute given to some other tribunal. This latter course has been taken in many statutes, but, speaking generally, this second or other jurisdiction is given as an alternative to proceeding under the rules. In the one case the jurisdiction is derived from the rule, in the other from the statute. As I have said, the rules may select and appoint any person or persons or body as the tribunal to determine the disputes. But whether the tribunal selected be a private individual or one of the established Courts of the country, it is always treated as an arbitrator selected by the parties, and, in the absence of express provision to the contrary in the statute, the law of arbitration applies. On the other hand, if the jurisdiction is given directly by the statute to one of the ordinary tribunals of the country, such as the County Court, or a Court of summary jurisdiction, the general jurisdiction of the

(1) 12 A. C. 197, at p. 205.

Court applies, and if there is a general right of appeal from the decisions of the Court, it applies to its decisionon the dispute. Some Acts, however, have express provisions that there shall be no appeal in such a case. This of course shows that in the absence of such a provision the general rule applies.

All the Acts, I think, contain a provision that the decision of the tribunal appointed by the rules shall be binding and conclusive, and the later Acts that it shall not be subject to appeal. In the present case the rule provides for the determination of disputes by a Court of summary jurisdiction. If there was nothing else in the statutes, it would be clear that there would be no right of appeal. On the other hand, if the rule did not contain the provision, and the statute simply said, "A Court of summary jurisdiction shall have jurisdiction to decide disputes," I think it would be equally clear that there would be a right of appeal. The fundamental question in dealing with any provision on the subject is: Does it refer to arbitration or to the ordinary jurisdiction of a Court, i.e., to the Court qua Court, or to the Court qua arbitrator? This, in my opinion, is the question on which the present case depends.

The question, then, in the case is whether the jurisdiction of the Court of Quarter Sessions to hear an appeal from a Court of summary jurisdiction is taken away because the jurisdiction of the latter Court was a jurisdiction given to it and exercised by it qua arbitrator, and not qua Court. If it was the latter, the jurisdiction of the Quarter Sessions was clear.

I shall now refer to some of the statutes in illustration of the above distinction. When not otherwise stated they are Friendly Societies Acts. First comes the Consolidation Act of 1850 (13 & 14 Vict. c. 115). Sect. 23 of this Act only applies to cases where the rules provide for settlement by arbitration. Sect. 24, however, provides for the case of no arbitrator being appointed or no award being made within forty days in the case of arbitration, and for the case of the rules appointing Justices as the tribunal. In either of these cases the Justices may hear and determine the complaint. It is plain from this that Justices, even when appointed by the rules, are not treated as arbitrators. Now, sect. 23 provides that the award of arbitrators shall be binding without appeal.

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The jurisdiction of the Justices under sect. 24 is the same whether they are appointed by the rules or not, except that if they are not, their jurisdiction only arises on default of the arbitrators. The jurisdiction is directly given in this latter case by the Act, and there is no clause in sect. 24 corresponding to that in sect. 23, that the decision is without appeal. And even if the words in sect. 22, "shall be binding and conclusive," exclude an appeal, these words would not apply to them, as they were not appointed by the rules in this latter case. This Act is remarkable in its distinction between "arbitrators" and Justices when appointed as the tribunal by the rules. This distinction entirely disappears in the subsequent Acts, and the Courts have held that when the rules prescribe Justices: *Callaghan* v. *Dolwin* (1); or the County Court: *Wilkinson* v. *Jagger* (2), as the tribunal to settle disputes, they are to be regarded as arbitrators. This Act was repealed by the Consolidation Act of 1855 (18 & 19 Vict. c. 63), and as this is the Act on which the important case of *Callaghan* v. *Dolwin* (1) was decided, it must be carefully examined and compared with the former Act. In sect. 40 it will be seen that it provides that in all cases the decision of the tribunal appointed by the rules shall be without appeal. The proviso is that where the rules of an existing society prescribe Justices, the dispute shall be settled by the County Court "as hereinafter mentioned."

Now the County Court had no jurisdiction under these rules. Under the proviso it gets its jurisdiction direct from the statute, as the justices did in the latter case under the preceding Act of 1850. But here we have in sect. 41 the express provision, "The decision of such County Court upon and in relation to such application as aforesaid shall not be subject to any appeal"—the clause omitted in sect. 24 of the Act of 1850. This was necessary, as the jurisdiction was given directly by the statute, not by the rules, and therefore to the Court qua Court. Sect. 41 gives a general jurisdiction in certain cases, and in certain events, to the County Court as such, in addition to that conferred by the proviso, but it is clear that the express clause against appeal applies to this jurisdiction under the proviso also. This Act gave no independent jurisdiction to the Justices as such, as the Act of

(1) L. R. 4 C. P. 288, at p. 294. (2) 20 Q. B. D. 423.

1850 did. The proviso took away the jurisdiction which the rules had given to Justices, and substituted an independent jurisdiction of the County Court. By independent jurisdiction I mean a jurisdiction qua Court, not qua arbitrator coming from rules.

I now take the Act of 1858 (21 & 22 Vict. c. 101). The repeal by section 5 of the proviso contained in sect. 40 of the Act of 1855 restored to the Justices, with the jurisdiction conferred on them by the rules, a jurisdiction qua arbitrators. Had they any other jurisdiction? Sect. 5 only applies where the rules appoint the Justices. Does it give them any jurisdiction of an independent nature qua Justices apart from that given by the rules? According to the principles I have stated, if it did there would have been a right of appeal; if it did not, there would not. This was the test applied by the Court in *Callaghan* v. *Dolwin* (1). The case was decided on the specific ground that sect. 5 did "no more than prescribe that the mode of procedure before the Justices shall be according to 11 & 12 Vict. c. 43, and that it was not meant to take from the character of referees, viz. persons selected by the Society to decide upon their disputes." It follows from this that the only jurisdiction the Justices had was under the rule, and therefore the Court came to the conclusion expressed in the final sentence, because it was the only jurisdiction the tribunal had. The matter came before the Court on a special case. It was not a case of the Justices having two jurisdictions, one qua arbitrators under the rules, the other an independent jurisdiction qua Court under the statutes. The Court held that they only had the one under the rules qua arbitrators, and that they acted under it.

The only attempt to argue for the purely statutory jurisdiction qua Court was on the authority of *Reg.* v. *Lambarde* (2), which the Court overruled. The Court decided the case on the ground that the 5th section (*a*) only prescribed the mode of procedure before Justices; (*b*) that it did nothing more. The case is therefore no authority for the appellant in the present case; but to my mind it goes further. Suppose instead of sect. 5 a section having the effect of giving a direct independent jurisdiction to the Court, the Court would then have had before them a section which (*a*) did not prescribe procedure at all, and (*b*) gave an original independent

(1) L. R. 4 C. P. 288, 292, 293. (2) L. R. 1 Q. B. 388.

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jurisdiction to the Justices as such. Is it not plain that the decision would have been the other way? But sect. 7 of the Collecting Societies Act is precisely such a section. I therefore regard the case as a direct authority for the right of appeal in the present case.

I now come to the Consolidation Act of 1875 (38 & 39 Vict. c. 60). Sect. 22 of this Act may, for the purposes of this judgment, be taken as identical with sect. 68 of the Friendly Societies Act of 1896, and sect. 30, sub-s. 10, of the Act of 1875 is identical with sect. 7 of the Collecting Societies Act of 1896. It is obvious that the two Acts of 1896 must be read together. Indeed, the Collecting Societies Act of 1896 is substantially taken from sect. 30 of the Act of 1875 and some amending Acts which do not touch the present case.

I first take sect. 22 of the Act of 1875. This gives independent jurisdiction to a Court of summary jurisdiction and to the County Court (*a*) where the rules contain no direction as to disputes, (*b*) where they do; but no decision is given within forty days. This provision is identical in principle with the jurisdiction given to the County Court by sect. 41 of the Act of 1855, which it replaced, with the all-important difference that the clause in sect. 41 that the decision of the County Court shall not be subject to appeal is omitted. Sect. 22 (*a*) is replaced by sect. 68 (*b*) of the Friendly Societies Act of 1896, which is identical, save for an immaterial addition. *Wilkinson* v. *Jagger* (1) was decided on sect. 22 (*d*), and *Re Royal Liver Friendly Society* (2) was decided on sect. 30, sub-s. 10, of the Act of 1875, replaced by sect. 7 of the Collecting Societies Act of 1896. These cases show, if authority were necessary, that applications to the Courts under these sections are applications to the Courts qua Courts, not qua arbitrators, and that the decisions are subject to appeal and certiorari in the same way as ordinary decisions under the ordinary jurisdiction.

Under sect. 22 (*d*) of the Act of 1875, or sect. 68 (*b*) of the Act of 1896, the Society could compel the member to have the dispute determined by a County Court or a Court of summary jurisdiction, without appeal, by nominating the Court as the

(1) 20 Q. B. D. 423. (2) 35 Ch. D. 332.

well as Dublin, and the dead freight. As to this latter *Kish* v. *Taylor* (1) overrules the view of the majority in *Gray* v. *Carr* (2) as to dead freight. There is a statement in Carver, at p. 731, 3rd edition: "Though probably it would not make him liable for demurrage incurred before sailing from the loading port." Mr. Carver argued this in the case of *Lancaster* v. *Sharp* (3), hereinafter referred to; but the Court clearly held the opposite view. I cannot find any case supporting his view, and the contrary is stated in Halsbury and in Lord Justice Scrutton's work.

Dodd J. finds that the cargo in fact was delivered under the bill of lading. He says that "the intermediate contract"—that is the express or implied promise by the consignor to the captain or shipowner to do all that the bill of lading says shall be done by him—"is a fiction," and that the Bills of Lading Act was passed to get rid of this fiction. I am disposed to agree with the latter observation in cases to which the Bills of Lading Act applies, i.e., where the property passes by the bill of lading. But this throws light on the principle of the implied promise. In the passage quoted by Dodd J. from *Wegener* v. *Smith* (4) Maule J. says: "The defendant is liable for demurrage if the bill of lading makes it part of the contract. The fact of his receiving the goods, to which he is only entitled under a bill of lading, making them deliverable to him on payment of freight and demurrage, renders him liable to pay demurrage. That is putting it at the lowest. Here was evidence for the jury that the defendant contracted to pay demurrage." That is the case to which the Bills of Lading Act applies. It and the statement of the principle by Maule J. have no application to a case where the consignee owns the goods prior to the delivery of the bill of lading, and apart from its operation. But even in the case put by Maule J. the question of the contract between the receiver of the goods and the shipowner is a question of fact. This is settled by the case of *Sanders* v. *Vanzeller* (5), and stated to be settled law by Herschell L.C. in *White* v. *Furness Co.* (6). At p. 51 Lord

(1) [1912] A. C. 604.
(2) L. R. 6 Q. B. 522.
(3) 24 Q. B. D. 158.
(4) 15 C. B. 285.
(5) 4 Q. B. 260.
(6) [1895] A. C. 40, at p. 45.

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McKelvie v. Wallace.

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Watson said: "The existence of such an obligation was not matter of legal implication. It required to be proved as matter of fact." This case was one of those referred to by Gibson J., but I do not think Dodd J. has referred to it.

It is very important as containing a statement of the highest authority of the principle on which the contract by the consignee with the shipowner rests. It was a case of freight, not demurrage. The freight was payable under the bill of lading. The consignee accepted the cargo, but the shipowner insisted on his lien for freight and warehoused the goods. The consignee lodged the freight with the warehouseman and got the cargo. The shipowner then sued the consignee for the freight. Day J. gave judgment for the plaintiffs. The Court of Appeal affirmed their decision, Davy L.J. dissenting (1). The House of Lords (Lords Herschell, Watson, and Macnaghten) reversed this decision.

The principle of the decision, so far as it applies to the present case, is thus stated by Lord Herschell at p. 43:—"The question, therefore, at issue between the parties, and the only question, was whether the appellants were liable under the circumstances to pay the respondents the freight claimed by them. The appellants were not parties to the original contract of carriage; they were not persons to whom the property in the goods had passed, and who were therefore liable under the Bills of Lading Act; but it is said that they incurred liability by taking delivery of the goods. Now, it is not disputed that where a consignee takes delivery under a bill of lading, and the master of the vessel by giving delivery abandons his lien, there is evidence from which a contract to pay freight may be inferred. This has been regarded as the law ever since the case of *Sanders* v. *Vanzeller* (2); but in that case it was distinctly stated that it was not a presumption of law that such a contract existed, but only a presumption of fact. Inasmuch as a shipowner is entitled to retain goods for the purpose of securing payment of his freight, it is only natural to infer, if the goods are parted with to a consignee before the freight is paid, and the lien is thus abandoned, that it could only be on the understanding on both sides that the consignee undertook to pay the freight. And I cannot doubt that in such a case, except under very special

(1) [1894] 1 Q. B. 483. (2) 4 Q. B. 260.

complying with the statute. The schedule to the Act of 1896 provides, among such matters (No. 8), the manner in which disputes shall be settled. But sect. 68, sub-s. 6, makes express provision for the case where this is not done, and treats the society as lawfully existing, and therefore the body of the rules as valid and duly registered. I think that this shows that the schedule rules are directory only, and that non-compliance with one of them does not invalidate the registered rules.

O'CONNOR L.J.:—

The main idea of sect. 68 of the Friendly Societies Act, 1896, is that the rules of each society should provide for a tribunal to settle disputes, and the statute provides that the decision of such tribunal is to be binding and conclusive on all parties without appeal. Such a tribunal is in the nature of an arbitration Court. The provision as to the binding force and finality of the decision is according to good sense, having regard to the nature of the disputes, conversant as they often are with such matters as the status of members or other matters of the kind, which from their triviality or their nature are inappropriate for determination in a Court of law, with its presumed expense, delay, and formality.

The statute also contemplated the possibility of a society wishing to have its disputes determined by Justices, as being persons fitted for the purpose by training, experience, and freedom from bias. In such a case it was provided that the determination should be by a Court of summary jurisdiction, which expression usually means one or more magistrates sitting in Petty Sessions—thus ensuring a fairness, publicity, and degree of regularity in the proceedings which might otherwise be absent. But in this case, too, as I conceive, the tribunal partook rather of the nature of an arbitration Court than of a Court of law, as the provisions in sub-section 1 as to the execution of its decrees show. The decision of such a Court of summary jurisdiction was binding and conclusive and non-appealable under sub-section 1.

We have then this state of affairs under sect. 68—that whatever tribunal was chosen by the rules, its decision was to be final and without appeal. The object of the statute was to enable the society, by its own rules, to fix its own domestic tribunals and to

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let the case go no further. But then the question arose, suppose the rules are silent as to provision for a tribunal? The statute supplied the omission; for by sub-section 6, in that case it enables the member or person aggrieved to apply to the County Court or to a Court of summary jurisdiction, at his option, to settle the dispute. In this case, no tribunal having been agreed on, the parties are left to the decision of a Court of law, strictly so called, and there is clearly such an appeal from the decision of the County Court, or Court of summary jurisdiction, as the statutes give in reference to these tribunals respectively.

So far as collecting societies are concerned, the Legislature saw possibilities of injustice being done if the provisions I have mentioned were not supplemented. It might happen that the rules of a society would provide for a tribunal whose members might be supposed to be biassed rather in favour of the society than of an aggrieved member; and accordingly it provides by sect. 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, that a member, notwithstanding any provisions of the rules of the society to the contrary, may apply to the County Court or a Court of summary jurisdiction for the settlement of disputes. In my opinion here, also, we have a statutory right of recourse to a Court of law, strictly, with all its incidents, including the right of appeal.

Mr. O'Byrne argues that the words "notwithstanding any provisions of the rules of the society or company to the contrary" confine the operation of sect. 7 to cases in which the rules either contain no provision for submission of the dispute to a Court of summary jurisdiction, or contain provisions inconsistent with such submission. I cannot accept that contention, which involves, to my mind, a straining of the language of the statute. The section is perfectly general in its terms, and, I think, general in its application. Further, the words "notwithstanding any provisions of the rules of the society or company to the contrary" are an express prohibition of any attempt, by rule, to contract out of the statutory right conferred by sect. 7. This statutory right is one of recourse to a Court of law, with its incident of appeal. Consequently, any attempt to restrict or qualify the statutory right is within the prohibition, and, therefore, I hold

that, even if Mr. O'Byrne's construction of the words "notwithstanding," &c., is correct, there is, in the present case, a "rule to the contrary," and that, therefore, sect. 7 applies, and a right of appeal follows. I may add that, as I think the statutory right under sect. 7 supersedes all inconsistent rights, the party going to a Court of summary jurisdiction must be held to go under this section, and not otherwise. If I am right in this, the absurdity, of a person at one time alleging and at another time denying the right of appeal, disappears.

Some reliance has been placed on the concluding words of sect. 7: "the Court may settle that dispute according to the provisions of the Friendly Societies Act, 1896." Whatever the provisions here referred to may be—probably the procedure indicated by sect. 68, sub-s. 6, of the Friendly Societies Act, 1896, is within them—they cannot be taken to limit the jurisdiction of the Court itself or to take away the right of appeal.

The report of *M'Aneny's Case* (1) is meagre; but we have, since the argument, been informed that there were no rules in that case. But I think the remarks of Palles C.B. in that case are inconsistent with any other view than that which I have endeavoured to express; and I am fortified in this opinion by the judgment of the King's Bench Division, which went expressly on that case. For these reasons, though not without doubt, I think the judgment of the King's Bench Division should be affirmed.

Solicitor for the appellant: *W. E. Chapman.*
Solicitors for the respondent: *E. I. Thornton & Son.*

C. L.

(1) 44 I. L. T. R. 147.

Appeal.
1919.

Jan. 27.
Feb. 17.

SANDERSON *v.* CUNNINGHAM AND OTHERS (1).

(1918. No. 2013.)

Practice—Service out of jurisdiction—Insurance Policy—Defendants resident in England—Completion of contract—Order XI, rule 1 (*f*).

The plaintiff, a person carrying on business in Dublin, made a proposal through Dublin brokers for a policy of insurance known as a "Dreadnought policy." The proposal was transmitted by the brokers to the defendants in London; and ultimately a policy was issued and posted by them to the brokers for delivery to the insured. The plaintiff, who was not personally aware of the conditions, submitted that the policy included conditions not contained in the proposal, and that the contract was not completed until he had, after the receipt of the policy from the brokers, signified acquiescence by accepting it.

Held, that the brokers had full authority from the plaintiff to negotiate for, and effect on his behalf, the particular policy in question; that the conditions usually contained in such a policy were well known to them, that the plaintiff through them received the precise form of policy for which he had bargained, and that as the contract was completed by the signing and posting of the policy in London, leave to issue and serve a writ out of the jurisdiction should not be given.

APPEAL on behalf of the defendants against an order of the King's Bench Division giving liberty to issue and serve a writ of summons on the defendants out of the jurisdiction.

The plaintiff claimed £500 upon a policy of insurance, dated the 28th June, 1916, by which the defendants insured the plaintiff against damages and costs arising from accidents to motor vehicles belonging to the plaintiff. The case presented by the plaintiff in the affidavits used in the King's Bench Division was that Messrs. Coyle & Co., insurance brokers, Dublin, forwarded to the defendants a proposal for the insurance of nine motor vehicles. The policy issued by the defendants contained a number of conditions which were not in the proposal, and of which the plaintiff had no knowledge until he received the policy from

(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

Coyle & Co. The plaintiff accepted the policy subject to the conditions on which it was issued.

On behalf of the defendants an affidavit was filed stating that the proposal was forwarded to the Dreadnought Motor Policies, through whom it was ultimately submitted to the defendants, the underwriters; and in due course the policy was prepared in London, signed by the underwriters there, and sent through the Dreadnought Motor Policies to Messrs. Coyle & Co. The policy contained on the front of it the following note, printed in red ink:—"The assured is requested to read the policy, and if incorrect to return it at once to the agents as under, to whom all communications referring to this insurance should be addressed." On the 16th June, 1916, Messrs. Coyle & Co. wrote to the Manager of the Dreadnought Underwriters asking to have the date from which the insurance was to run altered from the 17th May to the 17th June. The policy, with this alteration, was returned in completed form. Previously to the 28th June, 1916, the plaintiff had full knowledge of all the conditions in the completed policy; and, subject to the one alteration referred to, the policy was approved of by him.

The King's Bench Division (Dodd and Gordon JJ.) held that the policy ultimately sent to the plaintiff contained new terms not included in the proposal, and, on the facts before them, that the acceptance was in this country; and gave leave to issue and serve the writ out of the jurisdiction. From this decision the defendants appealed.

On the hearing of the appeal additional affidavits were used. Frederick S. Myerscough, Managing Director of Coyle & Co., stated that in December, 1912, his company was by the Dreadnought underwriters placed "on their list of agents." The proposal form sent to the Dreadnought underwriters by his company on behalf of the plaintiff referred to page 2 of a four-page leaflet, to which the proposal form was originally attached. This leaflet gave particulars of the risk covered by the policy, but did not intimate in any way what clauses or conditions would be contained in the policy. He swore that before sending on the proposal form on the 4th May he had detached the leaflet, and that it was not attached when he subsequently sent the proposal

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to defendants for signature, and, so far as he was aware, the plaintiff never saw a copy of same. The premium on the policy was paid by Coyle & Co. to the defendants.

In an affidavit on behalf of the defendants made by Mr. H. G. Olden, London, manager of the British Dreadnought Underwriters, and filed on 20th January, 1919, it was stated that the policy, the subject of this action, was what was well known as "The Dreadnought Commercial Motor Vehicle Insurance Policy at Lloyd's," subscribed by Lloyd's underwriters only. Lloyd's underwriters were not an insurance company. They had no agents, the whole of their business being done at Lloyd's in London through brokers who were members of Lloyd's. The duty of the brokers was to introduce proposals for insurance to Lloyd's underwriters in the room at Lloyd's in London, and Lloyd's underwriters alone could accept or refuse such proposals. The British Dreadnought Underwriters, Limited, were an insurance syndicate, carrying on business in London, and Messrs. Phillips & Co., one of the defendants, were Lloyd's brokers and members of Lloyd's. The British Dreadnought Underwriters submitted all proposals for insurance of motor vehicles to Messrs. Phillips & Co., who in turn had to submit the same to Lloyd's underwriters for the purpose of acceptance or refusal, and if such proposal was accepted Lloyd's underwriters signed the policy through their nominee, the whole business being transacted and completed in their room at Lloyd's. Messrs. Coyle & Co., insurance brokers, were not agents for Lloyd's underwriters, the defendants in this action; they were fully conversant both with the proposal for a policy of this kind and the policy itself, having taken many of such policies for different clients. The proposal for the policy was in the usual form with which Coyle & Co. and other brokers were supplied, for the purpose of giving full particulars of the risk which the policy was intended to cover, which were to be submitted to the underwriters. Having received from Coyle & Co. a definite proposal for a Dreadnought policy, the deponent submitted same to Phillips & Co., the London brokers, who placed it before Lloyd's underwriters, who accepted it. He returned the proposal to Messrs. Coyle for the purpose of having the same completed on the correct form. In the course of a few days he received from them the proposal form duly completed and

signed, with a letter asking him to prepare policy. Messrs. Coyle had no power to issue a policy. The policy was prepared and completed in London, and sent by him to Coyle & Co. for their client, the plaintiff. Some days later Coyle & Co. returned the policy with a letter requiring alteration in the description of the cars. Instead of endorsing the alteration on the policy a new policy was made out and perfected by the underwriters in London and sent by the deponent to Coyle & Co. Save as to the description of the cars the two policies were identical in every respect. The policy itself was usually the receipt for the first premium, and consequently no receipt was given in this case for the first premium. Messrs. Coyle & Co. not being the agents of the underwriters were not provided with any forms of receipt by the underwriters, and if they as brokers collected the first or any of the premiums, the practice was for them to account for it with the underwriters. In this case they did so account for the first premium. If they gave any receipt or acknowledgment to the plaintiff, it must have been on their own form and in their own name.

T. S. F. Battersby K.C. (with him *J. Henry*), for the appellants:—

The sole question in this case is—Where was the policy executed? for a policy has complete and binding effect once it is executed: *Xenos* v. *Wickham* (1); and it is made within the meaning of Order XI, rule I (*f*), wherever the signature of the last necessary party to it is affirmed: *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ltd.* (2). Further, the contract here was made by post, and the acceptance was complete as soon as the policy was posted: *Henthorn* v. *Fraser* (3). Coyle & Co. were agents for the plaintiffs, to whom they referred as their "clients" in all their correspondence. The defendants are members of Lloyd's underwriters, and have no agents. The broker who is instructed to effect a marine insurance, either directly by the person intending to insure, or indirectly through another broker, does not become for any part of the business of

(1) L. R. 2 H. L. 296. (2) [1901] A. C. 217, at p. 223.
(3) [1892] 2 Ch. 27.

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effecting the insurance the agent also of the underwriter: *Empress Assurance Corporation* v. *Bowring* (1). Coyle & Co., as agents for the plaintiff, asked for a definite thing, i.e. a "Dreadnought" policy. They had had experience of such policies, and knew what they were, and the conditions endorsed on them. Their knowledge was the knowledge of their principals: *Blackburn, Low, & Co.* v. *Vigors* (2). They received the first policy sent them, and returned it for correction without making any objection to the conditions. They also paid the first premium on it. They must, therefore, be taken to have assented to the conditions.

The Irish cases: *O'Leary* v. *Law Integrity Insurance Co.* (3), and *Savage* v. *General Law Insurance Co.* (4), are distinguishable, as in them the insurance companies had agents in Dublin.

William M'Grath K.C. (with him *Hector Hughes*), for the respondent:—

Coyle & Co. were agents for the plaintiff only for the purpose of forwarding plaintiff's proposal; they had no authority to agree to anything which was not contained in the proposal: *Yuill & Co.* v. *Robson* (5). The proposal forwarded made no reference to conditions, nor were any conditions referred to at page 2 of the booklet which was mentioned in the proposal. The policy sent, however, contained a number of conditions of which the plaintiff had no knowledge until he received the policy. The execution and forwarding of the policy could not, therefore, be regarded as an acceptance of the plaintiff's proposal. There could be no agreement until the plaintiff knew of and accepted the conditions; and this he did when he received the policy. The contract was, therefore, made in Ireland. In essentials, the case is in no way different from *O'Leary* v. *Law Integrity Insurance Co.* (3); *Lowden* v. *Accident Insurance Co.* (6), and *Savage* v. *General Life Insurance Co.* (4). The principle underlying these cases was recognized in *Allis Chalmers Co.* v. *Fidelity and Deposit Co. of Maryland* (7).

(1) 11 Com. Cas. 107, at p. 112.
(2) 12 A. C. 531, at p. 537.
(3) [1912] 1 I. R. 479.
(4) 47 I. L. T. R. 158.
(5) [1908] 1 K. B. 270.
(6) 43 I. L. T. R. 277.
(7) 114 L. T. R. (N. S.) 433.

SIR JAMES CAMPBELL C.:—

The sole and only question for decision in this case is whether, upon its facts, the contract of insurance was completed in London or in Dublin; and the answer to this question must largely depend on the nature and extent of the authority of Coyle & Co., the insurance agents or brokers, who effected the insurance on behalf of the plaintiff.

We are all of opinion, differing in this respect from the judges in the King's Bench Division, upon the affidavits and correspondence in the case, that Coyle & Co. had full authority from the plaintiff to negotiate for and effect on his behalf the contract contained in the particular policy sued on. We are also satisfied that the proposal was for a specific policy, known to Coyle & Co. as a Dreadnought Motor policy, which to their knowledge would contain the conditions usual in a policy of this description, and, in the absence of any evidence or suggestion that the conditions of the policy in question were in any respect unusual in this sense, we must hold that plaintiff, through his authorized agents, received the precise form of policy for which he had bargained. We cannot, therefore, accept the view upon which the King's Bench Division acted in holding that the proposal was for a Dreadnought policy which was to contain no conditions, or that the insertion of the usual conditions of such a policy required an opportunity for the inspection of the document by the plaintiff, or his authorized agents in Dublin, before the contract could be treated as complete. If the plaintiff, or Coyle & Co., upon receipt of the policy, had objected to it on the ground that the conditions, in whole or in part, were not usual in a policy of this particular description, it would have been open to them to repudiate it at their risk in the event of it being subsequently found that the conditions were in fact only such as were usual; but this consideration cannot affect the question as to the venue in which the contract was completed.

Further, we are of opinion that in the circumstances of this case this contention on behalf of the plaintiff wholly fails upon another ground, because it appears from the correspondence that when the original policy was executed by the defendants, and

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received in Dublin by Coyle & Co., as the agents for the plaintiff, it was returned by them with a request for one alteration only, namely, a correction in the description in the policy of the particular vehicles to be insured. No objection whatever was taken at that time by Coyle & Co. to the conditions, which were in print, and were presumably the usual conditions in a Dreadnought policy; but the defendants, instead of returning it with the desired alteration, executed a fresh policy, which was precisely the same as the other in every respect, save as to the amended description.

These facts seem coercive as to the knowledge of Coyle & Co. that they had received a policy which agreed in form and effect with that for which they had proposed; and if it is the fact, as alleged on the part of the plaintiff, that this fresh policy was never seen by him, I think his acts, in subsequently refunding to Coyle & Co. the premium which, as their agents, they had paid on their account to the defendants, and in bringing this present claim upon foot of the policy, are coercive to the conclusion that Coyle & Co. had the fullest authority from him to complete the transaction.

It is always possible that a presumed acceptance of an offer may introduce a new term into the contract proposed, but the argument on behalf of the plaintiff would seem to lead to this, that in every contract the person who makes the offer is entitled by law to a reasonable interval in order to enable him to determine whether the acceptance is in fact in strict compliance with the offer, and that consequently the contract can never legally be complete until he has been afforded such an opportunity—a contention which is directly in conflict with the principles which determine the completion of the contract in all cases of an offer, followed by an unqualified acceptance. In this case we are of opinion that when the defendants executed the fresh policy and forwarded it from London to the authorized agents of the plaintiff, they both in fact and in law accepted the precise proposal that had been made to them, and consequently completed the contract. The contract was complete at the latest when, by forwarding the policy from London to Coyle & Co. in Dublin, they thereby communicated their acceptance of the proposal to

the agents of the plaintiff, and as this was done in London we must reverse the order appealed from, and discharge the order for service of the writ outside the jurisdiction, with costs both here and below. It only remains to add that our decision in no way conflicts with any of the Irish authorities that were cited in argument, as in each of them the Insurance Company had an agent in Dublin to whom they forwarded the policy for delivery to the insured, so that the communication of the acceptance by this act of delivery and the consequent completion of the contract took place in Ireland.

RONAN L.J.:—

I am of the same opinion, and I concur in the reasons stated by the Lord Chancellor.

This appeal raises a very grave question of general importance, involving the jurisdiction of the High Court in Ireland in certain cases which are unquestionably within the jurisdiction of the High Court in England. The appellants' case here is that the English Court has exclusive jurisdiction. Owing to the unfortunate state of the law in Ireland there is no appeal to the House of Lords on a motion such as this.

I suggested during the argument that the plaintiff should accept an order limiting his claim in the action to a contract made in Ireland, and referred to the note "Limitation of the Order" in the Annual Practice, 1919, at p. 86; but the parties declined to adopt this course, which would have enabled the point as to jurisdiction to be brought before the House of Lords.

O'CONNOR L.J.:—

I concur. It was admitted at the bar that Messrs. Coyle & Co. were agents for the plaintiff for the purpose of negotiating a policy of insurance in respect of their commercial motor vehicles. Certain arguments have been adduced for the purpose of showing some limitation of Messrs. Coyle's authority. It may be that Messrs. Coyle had no authority without the plaintiff's consent to close a bargain in respect of a policy, but in my view that consideration is not material and does not help the plaintiff. For certainly, it was Coyle's duty and business to look out for

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a suitable policy for their client, to convey such knowledge as they had or could obtain for their client, and to advise their client generally as to the transaction. Another matter is equally clear, that Coyle & Co. were perfectly aware of what a Dreadnought policy was, what it contained and what it did not contain; they had been in touch with these policies from 1912; and before the transaction was finally closed they actually had for a month in their possession a policy which was made out for an erroneous number of cars.

On the 22nd of May, 1916, the plaintiff, presumably after receiving advice from Messrs. Coyle, signed a proposal. That proposal set forth the risks to be covered, the premium to be paid, and the nature of the policy that was required, namely, a Dreadnought policy. It is argued that the plaintiff did not know what were the conditions on such a policy. That may be so; but he had all the means of knowledge, for he had the expert broker at his elbow to advise him. Is not the truth of the transaction this, that the plaintiff, knowing nothing as to the insurance policies, employed brokers who knew everything about them, trusted the brokers to choose a suitable policy, and having obtained the brokers' advice, ordered a certain policy? If that be so, the discussion as to whether the plaintiff did or did not know the conditions seems to me futile. He cannot be heard to say that he did not know the contents of the policy, including, of course, the conditions endorsed on the policy. The proposal so signed was posted to London; the policy of insurance, in accordance with the proposal, was signed in London; and it was duly posted to Dublin, to Messrs. Coyle & Co. acting on behalf of the plaintiff. In my opinion, it is clear in these conditions that the contract was made in England.

It was suggested on behalf of the plaintiff that the policy was not in conformity with the terms set forth on p. 2 of a booklet of which the proposal formed part; and that that being so, the policy was a mere offer which was accepted in Ireland by the payment of the premium or by acquiescence. The answer is twofold—first, that when the plaintiff signed the proposal, the proposal was not attached to the booklet, which indeed had not been seen by the plaintiff; and secondly, that the policy was in all respects in accordance with

the plaintiff's instructions and proposal, and indeed with the booklet, which merely indicated, in a general way and in popular language, the nature of the risks insured.

It will be noted that I base my decision on a very narrow point, namely, that an Irish firm proposed in Ireland for a specific policy of insurance, with the terms of which the firm were actually or constructively familiar, and that this proposal was accepted (and a contract established) by the signing in England of such a policy as proposed for, or by the posting of such policy in England, addressed to the agent in Ireland for the plaintiff. If Messrs. Coyle & Co. had not been agents for the plaintiff quoad the receipt of the policy, different considerations might have arisen, but it has not even been argued that that is the case here. For example, if they had instructions from England not to deliver the policy (which would be the usual way of indicating acceptance of the proposal) until the premium was paid, an argument might have been advanced that the payment of the premium, and not the signing of the policy, concluded the bargain. When that case arises, we shall deal with it; but it is far removed from the present case.

Solicitors for the appellants: *O'Neill & Collins.*
Solicitor for the respondent: *J. H. Montgomery.*

C. L.

K. B. Div. 1918.

Nov. 21.

THE CORK IMPROVED DWELLINGS CO. *v.* DANIEL BARRY (1).

War—Emergency legislation—Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 *Geo.* 5, *c.* 97)—*Notice of intention to increase rent—Effect—"Rates chargeable on the occupier"—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *sect.* 181.

The landlord of premises to which the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, applied, served notice of intention to increase the rent in respect of the increase in the amount of rates thereon paid by him. The rates in question were (*a*) poor rate, and (*b*) certain rates levied under local Acts which incorporated the Towns Improvement Clauses Act, 1847. The tenant refused to pay the increased rent.

Held, 1, That the rent was increased by service of the notice without any agreement by the tenant to pay the increased rent. 2. That the landlord was entitled to increase the rent in respect of the increase in the amount of poor rate, but not in respect of the increase in the amount of the rates levied under the local Acts.

Case Stated by Moore J. at Cork Summer Assizes, 1918.

The plaintiffs were the owners of a house in the Borough of Cork, which was by agreement in writing dated 27th July, 1907, let by them to the defendant at 4*s.* 10*d.* per week on a weekly tenancy; no mention was made in the said agreement as to the payment of rates, but the rates were in fact always paid by the plaintiffs. The Poor Law Valuation of the house was £5. The rates on the premises for the half-year ending 31st March, 1918, exceeded those for the half-year ending 30th September, 1914, by 9*s.* 7*d.* On 28th January, 1918, the plaintiff served notice under the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, of his intention to increase the rent by 4*d.* per week.

The rates paid by the landlord, in respect of the increase of which it was sought to increase the rent, were Poor Rate, General Purposes Rate, Improvement Rate, and Domestic Water Rate. The General Purposes Rate and the Improvement Rate were

(1) Before Dodd and Gordon JJ.

levied under the Cork Improvement Act, 1852 (15 & 16 Vict. c. 143), secs. 37 and 46, and sec. 118 respectively; by sec. 88 of the said Act, the several clauses and provisions of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), with exceptions not material to the present case, were incorporated in the said Act. The Domestic Water Rate was levied under the Cork Bridges, Waterworks, and Improvement Act, 1856 (19 & 20 Vict. c. 48), sect. 43, whereby the Corporation were authorized to levy such a rate upon the occupiers of all dwelling-houses according to their valuation; by sect. 47 of the said Act the several clauses and provisions of the Towns Improvement Clauses Act, 1847, with respect to the manner of making rates, and with respect to the recovery of rates, were incorporated with the said Act, and applied to the water rates thereby authorized. The plaintiffs were rated in respect of the General Purposes Rate and the Improvement Rate; the defendant was rated in respect of Domestic Water Rate.

On 23rd June, 1899, the Council resolved, in pursuance of the Local Government Act, 1898 (61 & 62 Vict. c. 37), sect. 53, that the provisions of that section requiring the Council to levy the rates which they were empowered to make independent of that Act on the occupier and not on the landlord, should not apply to any rate which the Council were empowered to levy under any local Act.

The defendant refused to pay the increased rent, and the Civil Bill was brought to recover 6*s.* 2*d.*, being one week's rent at 5*s.* 2*d.*, and three sums of 4*d.* each, the arrears due for the three previous weeks; the defendant tendered and lodged in Court 4*s.* 10*d.*

The Recorder held that the plaintiff was entitled to increase the rent by the amount of the increase on the Poor Rate, ½*d.* per week, but not in respect of the increase in any of the other three rates, and made a decree for 5*s.*

The questions for the determination of the Court were:—1, whether in order that a rent should be increased under sect. 1 of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, it is sufficient to serve a notice in pursuance thereof, or whether an agreement by the tenant is necessary; 2, whether the said rates, or any and which of them, are chargeable on the

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occupier within the meaning of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915.

Conner K.C., and *Daly*, for the plaintiff:—

No agreement by the tenant to pay the increased rent is contemplated by the Act; the only way of raising the rent is by giving notice under sect. 1, sub-s. 1 (6), of the Act: *Wortley* v. *Mann* (1). They referred to *Sutton* v. *Hollerton* (2), *Steel* v. *Mahoney* (3). As to the amount, Poor Rate is clearly chargeable on the occupier. The defendant is rated for Domestic Water Rate, and is therefore liable for it. Domestic Water Rate is not charged on the premises, nor is it made payable in respect of the premises, and sect. 181 of the Towns Improvement Clauses Act, 1847, was not incorporated with the local Act in respect of that rate.

T. Sullivan K.C., and *D. B. Sullivan*, for the defendant:—

The Act did not confer on the landlord any new right to raise the rent; it only left the parties, in the excepted cases, in their former position. The object of the notice is only to enable the tenant to ascertain whether the circumstances warrant any increase, and it is for the protection of the tenant; there must be both the service of the notice by the landlord and an agreement by the tenant to pay the increased rent. If the tenant will not agree, the landlord's only remedy is to serve notice to quit. Under the Towns Improvement Clauses Act, 1847, sect. 181, incorporated in the local Acts, the General Purposes Rate, Improvement Rate, and Domestic Water Rate are payable by the owner; the occupier is not chargeable with them.

DODD J.:—

This question turns on sect. 1, sub-s. 1, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. That sub-s. restricts the right of the landlord to increase during the war the

(1) [1916] W. N. 390. (2) [1918] W. N. 237.
(3) [1918] W. N. 253.

rent of houses to which the Act applies, and prevents any agreement whereby the tenant is deprived of this benefit. But the landlord also requires protection, and the Act enables him to throw upon the tenant the burden of any increase in the amount of certain rates payable by the landlord over the amount payable before the war. By sect. 1, sub-s. (iii), "any transfer to a tenant of any burden or liability previously borne by the landlord shall for the purposes of this Act be treated as an alteration of the rent"; and the whole scope of the Act shows that it intended to effect a statutory insertion into the agreement of tenancy, of an altered amount of rent, which can be recovered, not by force of an agreement to alter the rent, but by force of the statute.

As regards the amount of increase, Poor Rate is chargeable on the occupier; the other rates in question are not chargeable on the occupier, within the meaning of the Act.

GORDON J. concurred.

Solicitor for the plaintiffs: *M'Carthy & Hanrahan.*
Solicitor for the defendant: *M. Healy.*

M. G. E.

H. L. 1919.

IRISH LAND COMMISSION *v.* FORDE AND ANOTHER.

Feb. 10, 12.

Landlord and tenant—Action for recovery of land—Estate purchased by Irish Land Commission—Tenant failing to sign undertaking to purchase his holding—Non-payment of rent—Remedy—Irish Land Commission as landlords—Powers—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *sects.* 6, 18, *and* 19.

Where the Land Commission acquire an estate under sect. 6 of the Irish Land Act, 1903 (3 Edw. 7, c. 37), they may, exercising the powers of landlords, proceed, against a tenant who has failed to sign an undertaking to purchase his holding, by way of ejectment for non-payment of rent.

APPEAL from the judgment of the Court of Appeal (1).

Counsel for the appellant: *W. M. Jellett K.C.* (of the Irish Bar) and *F. MacMullan* (of the English Bar).

Counsel for respondents: *Wylie K.C.*, *Babington K.C.*, and *Phelps* (all of the Irish Bar).

THE HOUSE OF LORDS (Lord Birkenhead C., and Lords Finlay, Atkinson, Shaw of Dunfermline, and Parmoor) unanimously affirmed the decision of the Court of Appeal in Ireland.

Solicitors for the appellants: *Withem, Roskell, Munster, and Weld*, agents for *Daniel Purcell.*

Solicitors for the respondents: *Nichol, Manisty, & Co.*, agents for *Henry M. P. Hare.*

(1) [1918] 2 I. R. 231, 244.

PROVINCIAL BANK OF IRELAND *v.* FISHER.

H. L. 1919. Feb. 17, 18.

Principal and surety—Conditional undertaking in writing to pay debt of another—Promissory note—Guarantee—Release of surety by giving of time to principal—Consent to giving of time.

The defendant, amongst other signatories, signed an instrument whereby, in consideration of the plaintiffs advancing to P. and R. the sum of £140, he, jointly and severally with the other signatories, undertook to pay the plaintiffs the said sum, with the usual rate of bank interest, within six months from the date of the instrument. The plaintiffs subsequently advanced to P. and R. the sum agreed upon, taking from them promissory notes for the payment thereof, which notes were renewed from time to time without the express consent of the defendant.

Held by the House of Lords (1), affirming the decision of the Court of Appeal in Ireland ([1918] 2 I. R. 521), that the instrument was a guarantee, that the plaintiffs had not discharged the onus of proving consent by the defendant to the giving of time to the principal debtors, and that the defendant was entitled to a direction at the trial.

APPEAL from the judgment of the Court of Appeal (2).

Counsel for the appellant: *Daniel M. Wilson K.C.* and *Phelps* (both of the Irish Bar).

Counsel for the respondents: *The Solicitor-General for Ireland* (*Denis S. Henry K.C.*), and *Jeremiah MacVeagh* (of the English Bar).

THE HOUSE OF LORDS (Lord Birkenhead C. and Lords Finlay, Atkinson, Shaw of Dunfermline, and Parmoor) unanimously affirmed the decision of the majority of the Court of Appeal in Ireland, upon the ground that there was no evidence of assent by the respondent to the various renewals of the bills.

Counsel for the respondent were not called on.

Solicitors for the appellant: *Farrer & Co.*, agents for *John Tweedy*.

Solicitor for the respondents: *H. Z. Deane*, agent for *Fisher and Fisher and Hamilton*.

(1) Before LORD BIRKENHEAD C., and LORDS FINLAY, ATKINSON, SHAW OF DUNFERMLINE, AND PARMOOR.

(2) [1918] 2 I. R. 521, 538.

K. B. Div. 1917. Nov. 7. Dec. 20.

Appeal. 1918. April 18, 19, 22. May 13.

H. L. 1919. Feb. 25.

JAMES McKELVIE (TRADING AS THE EIRINN STEAMERS CO.) *v.* WALLACE BROTHERS, LIMITED (1).

(1915. No. 10,934.)

Ship and shipping—Contract—Charter-party and bill of lading—Delivery of cargo without production of bill of lading—Detention at port of discharge—Demurrage—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *sect.* 18.

On June 26th, 1915, the defendants, W. Bros., coal merchants in Dublin, entered into a contract for the purchase of a quantity of coal from R. & Sons, a Glasgow firm. The contract note contained no reference to demurrage; but in a letter of the same date to the vendors, the defendants intimated that they were prepared to pay a reasonable rate of demurrage. It was provided by the contract that the coal was to be supplied c.i.f. to Dublin, steamers to be discharged in twenty-four running hours from arrival. In pursuance of their contract with the defendants, R. & Sons entered into a charter-party, dated the 6th July, 1915, and executed later with M'K., the plaintiff, for the carriage of the ~~coal~~ ~~by~~ one of his ships to Dublin. The charter-party contained the usual conditions, including a cesser and lien clause, and provided that demurrage at the rate of 15*s.* per hour should be paid for detention over the specified time of twenty-four running hours. The plaintiff did not execute the original contract, and the defendants were not expressly parties to the contract of affreightment with the shipowner.

The vessel arrived in Dublin on the 11th of July, and the discharge of the cargo was completed on the afternoon of July 14th, thirty-six hours after the expiration of the time stipulated for discharging. A bill of lading, incorporating the provisions of the charter-party, was prepared on July 12th, signed by the plaintiff on the 13th, and posted by the shippers on the 14th to the defendants, who duly received it on July 15th, when the vessel had completely discharged her cargo, and had left the port of Dublin. In these circumstances the plaintiff sued the defendants for demurrage.

Held, by the King's Bench Division (Sir James H. Campbell C.J. and Madden and Dodd JJ.), reversing the decision of Gibson J., that the cargo was delivered by the ship and accepted by the defendants under the bill of lading, and upon the terms that they should pay demurrage to the shipowner at the rate agreed upon between him and the consignors.

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ. Affirmed in the House of Lords before LORD BIRKENHEAD C., and LORDS BUCKMASTER, ATKINSON, SHAW OF DUNFERMLINE, and WRENBURY.

Held, by the Court of Appeal (reversing the King's Bench Division and restoring the judgment of Gibson J.), that as soon as the coal had been put on board the vessel at Glasgow there was an unconditional appropriation under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sect. 18; that the property then passed to the defendants; that it did not pass by the bill of lading; and that there was no contract by the defendants to pay demurrage to the plaintiff.

On appeal to the House of Lords,

Held, that the respondents were not bound by the terms of the bill of lading incorporating the charter-party, as the cargo had not been received or accepted by them thereunder.

NEW TRIAL MOTION.

This action for demurrage was tried by Mr. Justice Gibson without a jury at Trinity Sittings, 1917. The claim was on a specially endorsed writ, and the defendants were sued as consignees under a bill of lading, dated July 10th, 1915, of a cargo of coal carried by the s.s. "Temaire," owned by the plaintiff, from Glasgow to Dublin. The coal was purchased by the defendants from Messrs. W. F. Russell & Sons, Glasgow, in the month of June, 1915, and the vendors of the cargo chartered from the plaintiff, under a charter-party dated July 6th, 1915, his ship, the s.s. "Temaire," for carriage of the coal to Dublin.

By the charter-party the entire cargo was to be discharged in twenty-four running hours from the vessel, being placed at the merchants' disposal at the berth indicated for discharging as customary, irrespective of shortage of labour or waggons; otherwise demurrage at the rate of 15*s.* per hour was to be paid. The s.s. "Temaire" with her cargo of coal for the defendants arrived at Dublin on July 11th, 1915, and was berthed and placed at merchants' disposal on the following day at 7 a.m., but the discharge was not completed till 7 p.m. on July 14th, when thirty-six hours' demurrage became due, and in respect of this the plaintiff claimed £27 from the defendants. It was sought to make the defendants liable for the demurrage on the ground that they received delivery of the cargo under the bill of lading of July 10th, 1915, which incorporated the terms of the charter-party between Messrs. Russell and the plaintiff.

The defendants denied that they received delivery of the cargo of coal under the said bill of lading; they averred they

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did not receive the bill of lading; that they were not parties thereto; that they had no knowledge or notice thereof; that they were not parties to or bound by the charter-party made between the plaintiff and Russell & Sons. All the facts upon which this defence was founded appear sufficiently from the judgments.

Mr. Justice Gibson found that the defendants did not receive delivery under the bill of lading, and entered verdict and judgment for them. The plaintiff applied to the Divisional Court for an order that the verdict be set aside, and that judgment be entered for him on the grounds that the verdict was against the evidence and weight of evidence, and that the learned judge misdirected himself in point of law.

Hanna K.C. and *Andrews*, for the plaintiff.

S. L. Brown K.C., *Dickie K.C.*, and *Swayne*, for the defendants.

The arguments were similar to those in the Court of Appeal.

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DODD J. delivered the judgment of the Court as follows:—

The action is brought upon a specially endorsed writ by the plaintiff who is a shipowner carrying on business in Edinburgh as the Eirinn Steamers Co., owners of the good ship called the "Temaire," for £27, being demurrage for thirty-six hours at the port of Dublin of their ship the "Temaire."

The plaintiff thought apparently the case was so clear that an application might be made on a specially endorsed writ for an ascertained amount, to which there was no defence. But a defence has been raised. It may be put in a sentence. There was no privity of contract between the plaintiff and the defendants.

The cargo of the "Temaire" was a cargo of coal, purchased by the defendants, Wallace Brothers, a firm in Dublin, from a firm in Glasgow, trading under the name of Wm. J. Russell & Sons. The Glasgow firm and the defendants entered into a contract with each other on the 26th June, 1915, which contained among other clauses provisions as to the payment of freight, as to the running hours for discharging, and also as to the discharging of the cargo by the Dublin firm. The plaintiff was not a party to that contract. The Glasgow firm after their contract with the defendants and in

letters constituting the contract between Wallaces and Russells seem to have crossed. Russells wrote from Glasgow on the 26th June stating their terms; Wallaces on the same day wrote from Dublin. Wallaces' letter must be regarded as part of the contract, and is in terms an acceptance of the offer of Russells, and in it they say: "We to pay a reasonable rate of demurrage, say 12*s.* 6*d.* an hour, should steamer be delayed in discharging after twenty-fours hours commencing from arrival in berth (accepting the arrival instead of the berthing), provided that should the steamer arrive at night after 6 p.m. time not to count until 6 a.m. in the morning."

To whom were the merchants to pay demurrage? The answer is, to the ship. Now the word "demurrage" has a known legal meaning, viz., the additional period during which the vessel may remain by agreement of the parties: *Gray* v. *Carr* (1). The learned Judge comments on the fact that there was no reply to this. There was no reply to either letter of the 26th June. These were the final letters closing the negotiations, and both parties so regarded them. They were at one.

In mercantile dealing, this letter amounts to this. The merchant says to the shipper: "In making your contract with the ship stipulate for a reasonable rate of demurrage, say 12*s.* 6*d.* an hour." That does not bind the shipper to 12*s.* 6*d.* It is an authority to the shipper to contract with the ship that the merchant will pay demurrage at a reasonable rate. The shippers here say 15*s.* was the best terms they could get. If the merchants have any complaint as to this, which I think they have not, it is against the shippers, not the ship. The ship is free from blame.

Third, there is a provision of some significance. The ship was to be discharged by the merchants. The discharge is the joint act of the ship and the merchant. The ship puts the cargo over the ship's rail, the merchant receiving it. The contract in this case provided that the entire discharge was to be done by the merchant, and that the ship was to allow him 1*s.* per ton. There was nothing in the contract between Russells and Wallace about the use of the ship's tackle, nor about berths. But there

(1) L. R. 6 Q. B. 522, at p. 528.

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was in the charter-party a provision as to this. The merchants accepted this service, claimed remuneration for it from the ship, and were allowed for it in reduction of the freight by the ship. They could do so only under a contract. What contract?

The "Temaire" was loaded at Glasgow on Saturday, July 10th, and started for Dublin that afternoon. The bill of lading was not ready, was not presented for signature before the vessel started. Some little controversy turns upon the master's answer to a question. He said: "A bill of lading was done without, and was sent to consignees by someone else." But the meaning is clear. The master usually signs the bill of lading. In the coasting trade, it is done without, that is, without being signed by the master, but is sent to the consignees signed by someone else in the shipowners' employment. When the master does sign he signs only on behalf of the shipowner. The master was ordered by telephone from the plaintiff in Edinburgh to deliver the cargo to Messrs. Wallace, the defendants. That was his authority as between him and the owners to deliver. It was in no sense a waiver of any stipulation made between the owners and the shippers. Saturday was a short day. Russells' office closed at 1 o'clock. They did nothing to complete the bill of lading, but they telegraphed to the defendant that the "Temaire" would sail at 4 o'clock, and confirmed the telegram by a letter of the 10th (the same day), adding that documents would be forwarded on Monday. The documents would be the invoice, colliery certificate, and bill of lading. On the 12th of July the bill of lading was made out at Glasgow, in Russells' office, be it remembered, and was sent to Edinburgh, reaching the shipowner on the 13th. This is the first time the bill of lading was presented for signature. The shipowner was in no default. The same day it was presented, it was signed and sent at once to the shippers. They sent it on to the consignees named in it, and the consignees got it, and have kept it ever since. Where was the shipowner in fault? The bill of lading was dated as of the 10th, the date on which it was taken as having been signed. It was signed as soon as presented. On the faith of its being completed, the ship was allowed to proceed.

It is rather startling to find that this courtesy is to be considered as any abandonment of rights, and that a document completed in good faith and according to contract is not to be regarded as the contract upon which the whole transaction proceeded merely because "the documents are to follow." It may be urged that though the defendants had knowledge there was to be a charter-party or bill of lading they had not notice of the particular document. That is immaterial—they knew the stipulations here in question would be contained in whatever form of charter-party or bill of lading had been adopted.

There is no necromancy either in a charter-party or a bill of lading. They are evidence of and contain the contract between the consignor and the ship. But in all the cases stress is laid as regards the consignee on the question—"Had he notice of the terms upon which he was to accept the cargo?" He could have notice by having a copy of either the charter-party or bill of lading, or he could have notice independently.

This matter of notice is the beginning, middle, and end of commercial law. It was to this Mr. Justice Willes and Mr. Justice Brett directed all their energy in a number of cases, notably in the leading case of *Gray* v. *Carr* (1), where it was sought to make the consignee liable not only for demurrage at the port of unloading, but also for demurrage at the port of loading and for dead freight, for not shipping a full cargo, and for damages for delay at the port of loading beyond the days allowed on demurrage.

The position of no one was altered by the non-arrival of the bill of lading. The consignees could not have claimed anything under the document that was not conceded to them by the ship, and they did claim and receive rights they could not have claimed save under the contract contained in the charter-party and bill of lading. On this question of whether the cargo was in fact delivered under the bill of lading the subsequent conduct of the defendants is clearly evidence, and conclusive evidence.

On the 15th July the plaintiffs write to the defendants:—"We are advised that the 'Temaire' s.s. left Dublin last night for Liverpool. Kindly send us closed accounts and balance of freight at your early convenience. Please note that this boat

(1) L. R. 6 Q. B. 522.

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has a claim amounting to £27 for demurrage, which kindly include in your remittance." To that there is no reply. At this time the defendants had the bill of lading in their possession. Again on the 26th July the plaintiffs write:—"We shall be glad to receive cheque in payment of freight and demurrage per this steamer, Glasgow to Dublin, at your earliest convenience." Another letter on the 2nd August, and another letter on the 9th of August follows, five letters in all, to none any reply. On the 12th August another letter follows in urgent terms requesting the payment of our freight and demurrage." And in reply to that, apparently without date, and without a covering letter, a "bought note" is sent by the defendants to the plaintiffs, setting out as a debit—Freight, £137 14*s.* 3*d.*; and claiming as credits—Discharging, £23 19*s.*; dues, £5 12*s.* 3½*d.*; petty outlay, 13*s.* Total, £107 9*s.* 11½*d.* And a cheque for that amount was enclosed. Now as regards the debit, except under the transfer of liability from shipper to consignee, the defendants were under no liability to the ship. They could have said, "Our contract with our sellers was c.i.f. Please look to the consignors for payment of freight." Mr. Brown said they paid it as agents. Why did they not refer the ship to the shipper? On the contrary, freight was claimed by the ship as a personal debt from the defendants to the ship, and as such was paid.

But the credits are still more significant. The defendants claim as against the ship £23 19*s.* for discharging. Under what contract with the ship? The captain made no bargain. In the same way with dues. The charter-party provided that the consignee or his agent was to do the ship's business at usual terms; on the other hand, the absolute undertaking in the contract of 26th June with Russells to deliver within twenty-four hours was modified in favour of the defendants by the charter-party. The ship was to discharge at such berth as was ordered by receiver, and the demurrage clause excepted cases of accidents, holidays, strikes, or any other unavoidable cause preventing its unloading the cargo—under this, prevention by the military would have been an answer.

When we turn to the other correspondence the present attitude of the defendants becomes still more curious. On the 14th July,

1915, Russells write to defendants: "S.s. 'Temaire.' We enclose B/L, which we trust you will find in order." To this there was no reply.

The shipowners then set the shipbrokers to work. Dougall & Stirrat write on the 13th of August very strongly to the defendants. To this there is no reply. Russells write at request of shipowners several letters. On 14th August they write asking for the reason of the detention. And on the 14th August at last the defendants write to Dougall & Stirrat: "We are in receipt of yours of the 13th instant re s.s. 'Temaire.' Freight was sent to owners some days ago. We entirely dispute their claim for demurrage. They appear to be a very exacting company." That is, they disputed the breach, not the contract. And on the 16th August the defendants condescended to write to Russell & Sons as follows: "Yours of the 14th instant re 'Temaire.' The owners know quite well that the quays were held up for military operations, and that the steamer got an exceptional discharge under the circumstances. They appear to us very unreasonable. She is a large boat, and when the authorities will only allow work for a few hours at a time, we think the owners instead of complaining should recognize the special effort that was made to clear the boat without delay." Another set of brokers was called in aid, Messrs. M'Kenzie & Son, of Dublin, and not even to them was there any claim made that the defendants were not liable to account to the plaintiffs. They purport to justify delay upon military excuses and for want of waggons. As regards the three matters therefore the parties stand in this relation—1. Merchants to discharge the ship and be allowed 1*s.* per ton by the ship for the discharge. 2. Merchants to pay freight to the ship, and be allowed credit for same in their payment of the coal. 3. Merchants to pay the ship 15*s.* an hour for demurrage if discharge be not completed within twenty-four hours from arrival.

The merchants did discharge, though not within the time specified. They did pay, after long delay, the freight of the ship. They claimed and were allowed credit for discharging the ship, in paying the freight.

Why should they not pay the demurrage? Because they had no privity of contract with the ship? The shipper was bound to

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pay it to the ship. The merchants were bound to pay it to the shipper. But it is said the merchants are not bound to pay it to the ship, because they were not in privity with the ship. Even before the Bills of Lading Act the Courts were able from the acceptance of the cargo under what was called a new contract between the consignee and the ship to make the consignee pay to the ship both freight and demurrage.

I desire to say a word or two upon the authorities cited for the defendants at the trial and the cases referred to by the learned Judge. No authorities seem to have been cited for the plaintiffs.

One can better understand those cases by taking the decisions upon which they were founded in their sequence of time, and dealing with those cited in the natural order. The learned Judge, I think, does scant justice to Mr. Brown's case of *Allen* v. *Coltart* (1). From Mr. Brown's point of view it is quite in point. I will come to it under its date.

It is to be borne in mind that the law had incorporated unto itself by decision of great Judges that part of the law merchant which made a bill of lading negotiable or quasi negotiable, so that the property in the goods passed by indorsement of the bill of lading, but the contract of affreightment was not transferred to the indorsee. And it is well to note in each case whether it was the consignee named in the bill of lading or the indorsee that was sued. It is well also to note whether the demurrage claimed were demurrage at the port of loading or at the port of discharge. Bearing these two matters in mind, I pass to a rapid review of the authorities.

In *Roberts* v. *Holt* (2), in the first year of James the Second the consignee named in the bill of lading was holden liable in an action for the freight or receipt of the goods; and that was so determined upon the custom of merchants.

In *Cock* v. *Taylor* (3), the doctrine was applied to an indorsee. Lord Ellenborough in giving judgment says, at p. 402: "It appears to me that though there was no original privity of contract between these parties for the payment of the freight, yet the taking of the goods from the ship by the purchaser under the bill of lading is evidence of a new agreement by him, as the ultimate

(1) 11 Q. B. D. 782. (2) 2 Shower, 443. (3) 13 East, 399.

appointee of the shippers for the purpose of delivery, to pay the freight due for the carriage of such goods, the delivery of which was only stipulated with the shippers to be made to the consignees named in the Bill or their assigns, *he or they paying freight for the said goods.*" The italics are in the report. Mr. Brown says yes, but there was a consideration for the new agreement, as the ship had a lien for freight. Lord Ellenborough does not put it upon that ground. But let that pass. Mr. Brown says it does not apply to demurrage, as there is no lien.

In the same year, 1811, the Common Pleas had the matter before them in *Jesson* v. *Solly* (1). This case was cited before us by Mr. Hanna, but was not apparently cited to the judge at the trial. That case is of interest upon more than one point arising in this case. Mr. Justice Willes has drawn attention to the fact I have already alluded to, that the contract was contained solely in the bill of lading. There does not seem to have been a charter-party. But further, when the vessel arrived no bill of lading had arrived in this country. The defendant paid the freight, but refused to pay the demurrage. Then, as now, the country was at war. Counsel for the plaintiff argued thus: In the mode in which the state of Europe requires commerce now to be conducted, the master of a neutral may perhaps never see his consignors again. It is therefore a necessary practice which prevails that he should *stipulate* (note the word) for payment by the consignees of demurrage as well as of freight. The Chief Justice had non-suited the plaintiff, but changed his opinion, saying: "My brothers are very clearly of opinion that if the consignee will take the goods, he adopts the contract." Heath J.: "Demurrage is only an extended freight, and the consignee by adopting this bill of lading makes himself liable to demurrage as well as to freight." Chambre J.: "It would be monstrous if the consignee accepting the contract with knowledge of the terms should not be bound by it, and could send the captain back to the consignor for demurrage." This case has been recognized as an authority in many subsequent cases which will be referred to, and has not been impugned.

It was the same Court that had decided *Broucker* v. *Scott* (2), reported in the same volume, p. 1. The cases are reconcilable.

(1) 4 Taunt. 52.

(2) 4 Taunt. 1.

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There is no implied promise to pay demurrage if the consignee has no notice of the terms of the contract of the consignor.

That was made clear in the case of *Wegener* v. *Smith* (1). There as here, it was argued the master had no lien for demurrage. Jervis C.J.: "Yes, he has, if it is covered by the bill of lading." Maule J.: "No matter whether there is a lien or a quasi lien for it or not, the defendant is liable for demurrage, if the bill of lading makes it part of the contract. The fact of his receiving the goods to which he is only entitled under a bill of lading making them deliverable to him on payment of freight and demurrage renders him liable to pay demurrage. That is putting it at the lowest. Here was evidence for the jury that the defendant contracted to pay demurrage." (The defendant has all through repudiated liability.) The judge concluded: "His repudiation of liability amounts to nothing. . . . As the defendant received the goods under the bill of lading, the demurrage was clearly a matter of just charge against him."

In the case cited by Mr. Justice Gibson of *Kemp* v. *Clarke* (2), the sole question was one of pleading. Was it under the charter-party or under a new contract? The Court held it was a new contract: "We are of opinion that the liability of a consignee or endorsee of a bill of lading to pay freight is a new contract, the consideration of which is the delivery of the goods to him at his request." That does not seem to conflict with the authorities cited.

The next case cited by Mr. Justice Gibson is *Smith* v. *Sieveking* (3), and in the Court of Exchequer Chamber (4). The question there was as to demurrage at the port of loading—Memel—before the bills of lading were signed. Thesiger and Manisty contended that if demurrage had accrued on this side of the water, the mere receipt of the goods under such a bill of lading would have made the defendants liable. For this they cited *Stindt* v. *Roberts* (5), and also *Wegener* v. *Smith* (1), which I have already noted. Lord Campbell accepted the authority of those cases, but held that the words in the bill of lading did not extend to a liability for pay-

(1) 15 C. B. 285.
(2) 12 Q. B. (N. S.) 647.
(3) 4 Ell. & Bl. 945.
(4) 5 Ell. & Bl. 589.
(5) 17 L. J. Q. B. 166; 5 D. & L. 460.

ment for the detention of the ship at Memel before the bills of lading were signed—a fact of which the consignee knew nothing, and of which the charter-party would not inform him.

In this case Lord Campbell sent for the papers in *Wegener* v. *Smith* (1), and ascertained that the demurrage sued for in that case had accrued in the port of delivery, and had arisen from the default of the defendants in not receiving the goods. And in the Court of Error Jervis C.J. said the action was for demurrage for his (the defendant's) own delay. Both are recognized as authorities in *Gray* v. *Carr* (2).

It remains to say a word or two upon the case of *Young* v. *Moeller* (3). It is reported in the King's Bench at page 7 of the same volume. The full Court, consisting of Lord Campbell C.J., Wightman, Erle, and Crompton, decided in favour of the plaintiff unanimously. The decision was reversed in the Exchequer Chamber by Baron Parke presiding, Mr. Justice Cresswell, Baron Platt, Mr. Justice Williams, and Baron Crowder. A good deal turned upon the pleading. The claim was for a breach of contract to receive. The action was against the assignee of a bill of lading. The Court in error did not purport to overrule previous decisions. It distinguished them. The assignee had received a part only of the contract. Baron Parke held that that was not the same as receiving the whole. He was bound by the decision in *Sanders* v. *Vanzeller* (4), in which he held that the acceptance of the whole might furnish evidence of a contract. Counsel pressed *Jesson* v. *Solly* (5) upon him. "In that case it was held that the consignee was liable for 'demurrage.'" (Baron Parke: "Yes, on delivery." "The Court said, 'If the consignee will take the goods he adopts the contract.'") There can be no doubt whatever that Baron Parke's attitude to the Judge-made law permitting a jury to find a new contract, thus filling up the gap in commercial law, which transferred the property in the goods without transferring the contractual agreement between the consignor and the ship, was one of hostility.

(1) 15 C. B. 285.
(2) L. R. 6 Q. B. 522.
(3) 5 Ell. & Bl., at p. 755.
(4) 4 Q. B. 260.
(5) 4 Taunt. 52.

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The three decisions in 1855, all in the Exchequer Chamber, were to some extent in conflict. It was in consequence of the decision in *Young* v. *Moeller* (1) that the Bills of Lading Act, 1855, was passed. The case of *Chappel* v. *Comfort* (2), cited by the learned Judge, was decided in 1861, after the Bill of Lading Act. That was an action against the indorsees of a bill of lading for demurrage on a cargo of potatoes. The decision turned upon the true construction of the bill of lading. The words were "paying freight as per charter-party," with a note in the margin: "There are eight working days for unloading in London." That was held not to make the defendant liable for demurrage. Erle C.J., in giving judgment, says:—"I quite agree with the cases of *Stindt* v. *Roberts* (3), *Jesson* v. *Solly* (4), and *Wegener* v. *Smith* (5), that if a bill of lading contains a promise on the part of the ship-owner to deliver the goods on the performance of a condition, if the assignee fails to perform his duty by complying with the condition, he is not entitled to the goods, and that the law infers a promise on the part of the assignee in such a case that he will do all that the bill of lading says shall be done by him if the ship-owner parts with his lien." The case was decided upon the ground that upon the true construction of the bill of lading there was no condition as to demurrage.

The next case is the one cited by Mr. Brown of *Allen* v. *Coltart* (6). The head-note is curiously inapt and misleading. Mr. Brown relies on some phrasing which is not essential to the decision. The learned Judge used the word "demand," and Mr. Brown said there was no demand here. Messrs. Wallace Brothers did not "demand" the goods. The word more frequently used is the word "accept." It is in that sense Mr. Justice Cave used it; there was no more "demand" in the case before him than there was here. Just as here, there was a demand as to a berth. Mr. Justice Cave goes back as far as 1811, to the case of *Cock* v. *Taylor* (7), and says, at 785 of the report:—"The ground of the decision is that where goods are deliverable to the holder

(1) 5 Ell. & Bl., at p. 755.
(2) 10 C. B. N. S. 802.
(3) 17 L. J. Q. B. 166; 5 D. & L. 460.
(4) 4 Taunt. 52.
(5) 15 C. B. 285.
(6) 11 Q. B. D. 782.
(7) 13 East, 399.

of a bill of lading on certain conditions being complied with, the act of demanding delivery is evidence of an offer on his part to comply with those conditions, and the delivery accordingly by the master is evidence of his acceptance of that offer." He immediately, however, shows what he means by demanding. Referring to *Stindt* v. *Roberts* (1), he says:—"It was held that the taking of the goods under it, the bill of lading by the indorsee, was evidence of an agreement to pay the demurrage." Baron Parke's words were "the receipt of the cargo," and "the acceptance of the cargo" were the words in the judgment in *Wegener* v. *Smith* (2).

The question for decision, says the Judge, is this: "Is there evidence in this case on which I ought to find that Messrs. Coltart agreed to take delivery on the terms of the bill of lading?" And he was of opinion that there was.

In result, I think it is a question of intention. If this cargo was "received," "accepted," by the defendants under a bill of lading which had not come to the hands of the consignees, but of whose provisions so far as it affected them they were cognizant, then, according to the principles in all these cases, the defendants would have been held liable even before the Bill of Lading Act. The only thing the consignees were not cognizant of was the exact rate of demurrage in the documents that were to follow. They knew there was a rate and that they were the persons who were to pay it. The cases of *Wegener* v. *Smith* (2) and *Smith* v. *Sieveking* (3) were decided in 1855, and immediately thereafter the Bill of Lading Act of 1855 was passed. It was to remedy the necessity of the new contract by means of which the Judges were endeavouring to carry into effect the real intention of the parties. The new contract was really a legal fiction.

This Act was based upon the principle, as stated in the preamble, that "it was expedient that all rights in respect of the contract contained in the bill of lading should pass with the property." Section 1 provides: "That every consignee named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of

(1) 17 L. J. Q. B. 166; 5 D. & L. 460. (2) 15 C. B. 285.
(3) 4 Ell. & Bl. 945.

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such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract had been made with himself."

There are two classes mentioned in the section: one is the class of consignees named in the bill of lading; the other is indorsees of a bill of lading. Mr. Brown contends that the merchant did not get the property in these goods by virtue of the bill of lading. I agree they were named as consignees because they got the property by the contract with the consignors. As consignees named they can sue the ship under the Act. The Act binds them by, and gives them the benefit of a bill of lading that was signed when they were not present. The second section preserves all rights as between consignor and consignee or indorsee.

A bill of lading is merely a receipt by the ship. It contains the terms on which the ship receives the goods, and when signed by the shipowner or someone else on his behalf, the statute takes effect. The whole transaction is carried out between the shipper and the consignor. The consignee is bound not by any contract with him and the ship but by statute.

The contract of affreightment, contemplated, as I have shown, by the merchant, was made by charter-party, dated as at Glasgow on the 5th of July, 1915. It provided that bills of lading were to be signed as presented, and it is not disputed that it was within the competence of the parties to the charter-party to make such provision. It bears date as at Glasgow, 10th July, 1915. In that bill of lading Messrs. Wallace Brothers, Limited, are named as consignees. What hinders, then, the right of the ship to proceed against the consignees named? The answer is, the bill of lading did not reach the consignee till after the ship was discharged. That is not a condition in the statute. It is usual for the consignee to produce the bill of lading to the ship. But it is not the duty of the ship to send the bill of lading to the consignee. But the production of the bill of lading may be either waived or not demanded on either side, and yet the delivery may be a delivery thereunder. Mr. Brown confines himself to the consignees' acceptance. He says it was an acceptance from the ship at common law. He disregards the point of view of the ship. Did

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April 18, 19, and 22.
May 13.

The defendants appealed (1).

S. L. Brown K.C. (with him *Dickie K.C.* and *Swayne K.C.*), for the appellants:—

We submit on the facts that there was no privity of contract between the plaintiff and the defendants on the subject of demurrage. The cargo was not delivered under the bill of lading. As a matter of fact the master of the s.s. "Temaire" sailed without a bill of lading. Although dated July 10th, the bill of lading was not signed until July 13th; and it was not received by the defendants until July 15th, after the cargo had been discharged, and the vessel had left Dublin.

Hanna K.C. and *Andrews K.C.*, for the respondents:—

A consignee of a cargo may be made liable for freight and demurrage by taking, receiving, or demanding goods under a contract, the terms of which have been agreed on expressly or impliedly, or are contained in a bill of lading received or subsequently adopted. In this case the appellants by their conduct adopted the bill of lading, and must be deemed to have taken delivery of the cargo under it. There was no unconditional appropriation of the coal to the contract until the shippers parted with the bill of lading; and where a person becomes indorsee of a bill of lading by which the property in goods passes to him, he shall take upon himself the contract of the shipper. [Authorities cited: *Fox* v. *Nott* (2); *Gabarron* v. *Kreeft* (3); *The Stettin* (4); *Shepherd* v. *Harrison* (5); *Mitchel* v. *Ede* (6); *Biddell Bros.* v. *Clemens Horst Co.* (7); *Mirabita* v. *Imperial Ottoman Bank* (8).]

Prior to the arrival of the goods at Dublin there was a contract between the plaintiff and the defendants by which the latter had bound themselves to pay demurrage at the rate of 15*s.* per hour. The effect of the correspondence was that the defendants authorized Messrs. Russell to make contracts with the shipowners for the payment of demurrage.

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.
(2) 6 H. & N. 630.
(3) L. R. 10 Ex. 274.
(4) 14 Pro. Div. 142.
(5) L. R. 5 H. L. 116.
(6) 11 Ad. & E. 888, at p. 903.
(7) [1911] 1 K. B. 214; [1911] 1 K. B. 934; [1912] A. C. 18.
(8) 3 Ex Div. 164.

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Brown K.C., in reply:—

Both in the contracts with the plaintiff and with the defendants the vendors of the coal acted as principals; and the transactions did not bear the interpretation that Messrs. Russell acted as agents of Messrs. Wallace with authority to enter into a contract which would make the defendants liable for demurrage.

The Sale of Goods Act, 1893, sect. 18, is a sufficient answer to the arguments that the property passed only under the bill of lading. Where in pursuance of a contract goods are delivered to a carrier for the purpose of transmission to a buyer, they are unconditionally appropriated to the contract, unless some terms denoting a contrary intention are imposed at the time of the contract or of the appropriation.

Cur. adv. vult.

May. 13.

Sir Ignatius J. O'Brien C.:—

Having given this case the most careful consideration, and paid the fullest attention to the arguments presented to us by counsel, I have, I greatly regret to say, come to the conclusion that the view of Mr. Justice Gibson is correct, and that, for reasons which I shall state, I cannot agree with the judgment of the Court below, delivered by Mr. Justice Dodd. I say with regret because I can quite appreciate the desire which any Judge would have, if he were at liberty to give effect to his inclinations, to decide in favour of the plaintiff in this action. The defence is not one, regarded in the light of fairness as between merchant and merchant, that commends itself to me; but the defendants, through their counsel, are entitled to rely upon any legal grounds open to them, and only from that point of view am I at liberty to consider the case.

In substance the short judgment delivered by Mr. Justice Gibson comes to this: the defendants were sued on foot of a certain alleged contract, but not brought into privity with that contract in such a way as to be bound by it; in other words, they were not a party to it originally, and by no process of implication could they be treated as bound by it.

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The action is brought by the plaintiff against the defendants as consignees under a bill of lading of July, 1915, of a cargo of coal carried by the screw steamer "Temaire," of which the plaintiff was the owner. The statement of claim averred that the bill of lading under which the defendants received delivery of the cargo incorporated the conditions of a charter-party, dated 6th July, 1915, made between the plaintiff and William F. Russell & Sons, including the conditions thereof as to discharging and payment of demurrage. By the charter-party the entire cargo was to be discharged in twenty-four running hours, irrespective of shortage of labour or waggons, otherwise demurrage at the rate of 15*s.* per hour was to be paid, the time for discharging to commence from the time the ship was ready and placed at merchant's disposal at the berth indicated for discharging as customary.

The "Temaire" arrived in Dublin with her cargo at 5 p.m. on 11th July, and was berthed and placed at the merchant's disposal at 7 a.m on 12th July, and the twenty-four running hours expired at 7 a.m. on 13th July. The discharge was not completed by the defendants until 7 p.m. on 14th July, whereby thirty-six hours' demurrage, at the rate of 15*s.* per hour, or £27, became payable, and the plaintiff alleges that the defendants must pay him this sum.

Shortly stated, the defence is that the appellants did not take delivery under the bill of lading, and that, therefore, they are not liable to the plaintiff for the demurrage provided for in the charter-party. It may be noted that this question of the privity of the defendants with the charter-party occurred to the plaintiff at a very early stage of the dispute, for in a letter of 17th August, 1915, from the plaintiff to Russell & Sons, I find this passage: "Did they receive a copy of this charter-party, and are they aware of the terms of the discharging time clause? As we intend to push this claim through the Courts, perhaps you will see if they really understand the position." Although that interrogatory had of necessity to be answered in the negative, the plaintiff decided to take proceedings, anticipating that possibly there might be no defence.

Although the judgment of the Court below sets forth at some length the various authorities dealing with the question of the

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liability of the consignees under bills of lading, its judgment proceeded as I conceive upon a very simple view of the case. Towards the end of his judgment Mr. Justice Dodd observed: "The question here is one of fact. Was this cargo delivered by the ship and accepted by the merchant under a bill of lading, though the bill of lading had not reached the consignee before the delivery commenced or concluded?" I do not accept that statement as being a quite correct representation of the case; but it shows that the learned Judge recognized that the question was one of fact, though, of course, to be considered in the light of settled authorities. It was not contended that if, in fact, the defendants had taken delivery under the bill of lading they could have escaped liability, nor even that, though the bill of lading had not come to Dublin until after the delivery, if there were antecedent documents showing that delivery was to be taken under the bill of lading liability could not arise.

It has been argued here that the charterers acted not on their own behalf, but as agents for Messrs. Wallace. With this view I am unable to agree. If in fact the charterers acted as agents for Messrs. Wallace, the plaintiff would in law have an unanswerable case, and the defendants would not be permitted to say that they had not taken delivery under the bill of lading and charter-party. I cannot, however, discover any evidence in support of the argument that the charterers acted as agents for the defendants.

There is no doubt that the contract in respect of the coal was a contract between Messrs. Russell & Sons, of Glasgow, and the defendants, Messrs. Wallace, to deliver 6000 tons of coal, at 22*s.* per ton c.i.f. in Dublin, less 1*s.* per ton for discharging. That is the first simple fact in the case. The vendors were Russell & Sons; the purchasers, Wallace Bros. The coal was to be delivered in Dublin; a sum of 1*s.* per ton for discharging was to be deducted, not, as was suggested, from the ship, but from the 22*s.* per ton; and the price of the coal also included the insurance and freight. The vendors, and not the consignees, were to insure; and the freight was to be paid by the consignors. True it is that if when the cargo arrived in Dublin the consignors had nobody there to represent them, Messrs. Wallace might have to defray the freight; they might also have to discharge the cargo; but the

performance of these functions by them would not be referable to any agency by Messrs. Russell on their behalf, but, as it seems to me, to an agency by them on behalf of Russells, who were bound to deliver c.i.f.

Coming to another matter the subject of debate at the Bar, namely, whose duty was it to obtain the ship in which the coal was to be conveyed to Dublin in pursuance of the arrangement to carry out the obligation arising under plaintiff's contract with the defendants of 26th June, 1915? surely it was Russell & Sons who did in fact enter into a contract with the plaintiff to supply the s.s. "Temaire" for the carriage of a portion of the coal; and they entered into that arrangement on their own behalf, and not as agents for the defendants. But it was argued that a telegram of 25th June from Messrs. Russell to the defendants in the following terms: "Your letter of the 23rd confirm six thousand tons, but shipowners stipulate steamers to be discharged twenty-four running hours from arrival. Should steamer arrive after 6 p.m., time not to count till 6 a.m. Presume you agreeable," affects the question, but at that time there was no charter-party; and it is quite clear that the telegram had reference to some arrangements between the shipowners and Russells; and I am unable to regard it as containing a stipulation which would make the defendants liable in respect of a charter-party which did not come into existence until some weeks later; but it is said that it must be connected with the letter written by Wallace Brothers to Messrs. Russell on 26th June. That letter was: "We have your telegram, and are agreeable to take 6000 tons of the best brands of Hamilton Ell coal at 22*s.* per ton net, to be delivered c.i.f. in Dublin, at the rate of 2000 tons per month during July, August, and September, we to pay a reasonable rate of demurrage, say 12*s.* 6*d.* per hour, should steamers be delayed in discharging after twenty-four hours commencing from arrival in berth, provided that should the steamer arrive at night after 6 p.m. time not to count until 6 a.m. in the morning." That letter is sought to be utilized as showing that the subsequent charter-party, which provided that demurrage was to be at the rate of 15*s.* an hour, was entered into in pursuance of an agreement between Messrs. Wallace and Messrs. Russell. It must, however, be mentioned that up to the day the writ was

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served the defendants never saw the charter-party; that at the time they signed the contract they knew nothing about the arrangement as to 15*s.* per hour. In so far as the letter indicates a willingness to pay 12*s.* 6*d.* an hour I cannot see how that can be construed into an agreement to pay 15*s.* under a charter-party which the defendants never adopted.

The action is brought on the basis of delivery having been taken under the bill of lading. No bill of lading was in existence at the time, and the cargo had been delivered before it reached Dublin. The "Temaire" started for Dublin on the afternoon of Saturday, 10th July. Saturday was a short day; no bill of lading was made out; the captain was ordered by telephone from the plaintiff to deliver the cargo of coal to Messrs. Wallace. Accordingly the vessel sailed from Glasgow on that Saturday and arrived in Dublin on Sunday, 11th July, without a bill of lading. On Monday morning the captain advised the consignees that the cargo was theirs, and that he was ready to give them delivery. Not a word was said about a bill of lading. Demurrage is claimed from 13th July, but it appears that no bill of lading had reached Dublin by that date. It seems it was made out on 12th July, and sent on that day from Glasgow to the plaintiff at Edinburgh; that it was forwarded to the defendants on 14th July and reached them on 15th July after the ship had been discharged and had sailed away. The charter-party contained a cesser clause, and it would be a great hardship if the captain, who acted in good faith, became liable by reason of what happened to his employers, the shipowners, but this cannot, I conceive, affect the result, though the existence of the cesser clause shows why plaintiff had to bring this action in its present, and, I conceive, only possible, form.

Now I come to the point where on a question of law there is a divergence between my view and that of Mr. Justice Dodd: He says:—"In truth and in fact the consignees were fully aware that they were receiving the cargo under terms agreed upon between the consignor and the ship. The fallacy in Mr. Brown's contention is that the right to the goods did not pass by any bill of lading, but under the original contract with the shippers. The property in goods in a bill of lading in which the consignee is named does not pass to the consignee by reason of the consignee

being named in the bill of lading. He is named in the bill of lading as consignee by the consignor as the person to whom the property has passed by reason of the contract." He goes on to say that the question was one of fact, and to the question: "Was this cargo delivered by the ship and accepted by the merchant under a bill of lading though the bill of lading had not reached the consignee before the delivery commenced or concluded?" he says they were all agreed the answer should be "Yes."

I differ entirely from their views. If I were to allow suspicion to take the place of evidence, I might admit that the conclusion drawn by Mr. Justice Dodd was right. One would expect that there would be evidence showing that Messrs. Wallace, who had been in the coal business all their lives, had been in the habit of receiving goods without a bill of lading; but no such evidence was given, and I fail to see that Mr. Brown's view contains the fallacy attributed to him. It seems to me that beyond aye or nay the property, had passed, and passed at a time when the bill of lading was not in existence, and that it did not pass under the bill of lading.

The question as to the passing of the property turns, I conceive, on the Sale of Goods Act, 1893. Whether the contract is looked at as one for the sale of unascertained or future goods by description, or whether it is one where the seller in pursuance of a contract delivers the goods to the buyer or to a carrier, does not appear to me to make any material difference in the present case. The contract in this case was to sell coal of a particular description. The coal was put on board ship; and a colliery certificate was to be taken as evidence of weight. When the goods were physically on board the "Temaire" at Glasgow, they had been ascertained beyond all question; they were in a deliverable state, and, in the words of sect. 18, rule 5, sub-s. 1, of the Sale of Goods Act, they were "unconditionally appropriated to the contract." Sub-s. 2 of rule 5 provides: "Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee [or custodier] (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract." Language could not be clearer, and, in truth, I cannot

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conceive any case in which the facts could more perfectly fit the terms of the section. The property seems to me to have passed quite independently of the bill of lading, which was not in existence at the date of appropriation. Some stress was laid on the opening words of sect. 18 of the Sale of Goods Act. They are: "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer." Where is the contrary intention here? The only contrary intention suggested is that, in the teeth of the contract itself, which provided for delivery c.i.f. in Dublin, the property could not pass until a bill of lading, not mentioned at the time, came into existence. If it be not a fallacy but a fact that the property in the goods had passed under the contract, what occurred to take the property out of Messrs. Wallace, and how in law could delivery in Dublin be attributed to a document not in existence instead of to the contract between the vendor and purchasers, the terms of which were fully complied with? I am aware of no law which prevents A and B from entering into a contract which would pass the property in goods in a ship in Glasgow merely because there is no bill of lading. It is suggested that the Bills of Lading Act works some mysterious result. I cannot see how the Bills of Lading Act affects this case. That being so, the only question left is the point made in the argument to the effect that when the ship came to Dublin, Wallace Bros. acted as agents for the ship; that is, that they discharged the cargo and charged for it. It is said that this agency must be referable to the charter-party; but as they did not know what was in the charter-party, it is impossible to yield to this argument. If shippers have not a local agent at a port, they may ask a consignee to act as agent for them, and so I find that the acts of the defendants in regard to this matter are not necessarily referable to the charter-party.

For these reasons I am unable to agree with the conclusions of fact arrived at by the Court below; and am of opinion that judgment should be entered for the defendants.

RONAN L.J.:—

If the case had come to us directly on appeal from the judgment of Gibson J., I should simply have adopted his judgment in every particular.

The judgment of the King's Bench Division (delivered by Dodd J., and apparently adopted by the Lord Chief Justice, and in its main conclusion by Madden J.) seems to me to raise serious questions of law, and of legal inferences from facts, and to express views on these questions which apparently form the basis of the judgment. As, unfortunately, my views on some of these questions are not the same as those expressed in the judgment, I think it only respectful to the Judges, for whose opinions I need hardly say I have the most unfeigned respect, to state fully my reasons for differing from them.

In his judgment Dodd J. says:—"It is said while the ship could sue the shippers for demurrage, the shippers could only sue the consignees for damages for delay. This is one of the matters I have to deal with later on. For the present we have this result of this commercial transaction: if Mr. Brown's argument is well founded, the shipowner must in the first instance sue the shippers, and recover from them on the contract between the shippers and the ship. The shippers must then sue the merchants, and recover from them what they have had to pay to the ship in consequence of the default of the merchants. It is a curious transaction in commercial dealing if this be what the parties intended. If so, of course we must abide by it. But we have to ascertain if this be the real transaction. That depends upon the contract." In the concluding part of his judgment he says: "The administration of the law is not to be blamed for so barren a struggle as this. There is ample provision in our rules for doing complete justice. The learned Judge by a stroke of his pen, if the parties had so desired, could have added Russell & Sons as plaintiffs. A member of the firm was in Court, and could have consented."

What is the explanation of this?—1. Why was the amendment not applied for and made? 2. Why was the action not brought against Russell on his charter-party, leaving it to him to recover what he had to pay against Wallace as damages for detention?

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Mr. Brown practically concluded his argument by reading the final passage above referred to. Mr. Hanna at once proceeded to state the matters which afforded the answer to the above questions:—1. The amendment would have been useless, as Russell had not paid the demurrage to the ship, or sustained any loss or damage by the detention; 2, the shipowner could not have brought any action against Russell on account of the lien and cesser clause in this charter. If Russell was not liable to the shipowner for the demurrage, he could not show that he had sustained any damage by the detention; they could not recover against Wallace on his contract that the ship should be discharged in twenty-four hours. Mr. Hanna explained this very clearly and very lucidly. It makes one thing clear, that is, that the Judges in the King's Bench Division never realized the effect of the lien and cesser clause. They thought that if the course suggested in the first passage of the judgment of Dodd J. had been taken, or the amendment made, there could be no question of the ultimate liability of Wallace; and their judgment was no doubt mainly caused by a desire not to allow Wallace to escape from a clear liability, through a mistake as to parties or procedure. This lien and cesser clause is completely ignored in the judgment; and the passages I have read show clearly that the Court never realized the effect of the clause in relieving Wallace from his liability under his own contract with Russell for damages for the detention. We never heard of the lien and cesser clause until Mr. Hanna mentioned it.

The shipowner having delivered the cargo pursuant to Russell's directions was by the cesser clause left without any remedy under the charter-party for his demurrage. He thought he had none unless he could prove a contract between himself and Wallace to pay it. Possibly Russell thought himself bound in honour to indemnify him for the consequences of having delivered the cargo at his request to a person who was not the holder of a bill of lading. Possibly Russell may be liable to him for this. I express no opinion on this question, or on the question whether if he is made to pay he can recover the amount from Wallace. It is plain that Russell intended the cargo to be delivered on the Monday, when there was no bill of lading in existence. Gibson J., on the other

hand, plainly understood the position, as is shown by his saying: "If the defendants are not liable, the charterers may be. Possibly this action is on their behalf." I confess I did not understand this until Mr. Hanna read the lien and cesser clause.

The question in the case is whether the defendants for valuable consideration promised the plaintiff to pay him demurrage at the rate of 15*s.* per hour for every hour above twenty-four that the ship was detained at Dublin. Having regard to the facts of the case, we must start with the rule of law which I take from Halsbury, vol. vii, pp. 342–3: "As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party even if the contract is made for his benefit, and purports to give him the right to sue or make him liable upon it?" The exceptions to this rule are cases where the relation of trustee and cestui que trust is created, and have no application to the present case.

In *Sewell* v. *Burdick* (1), at page 91, Lord Blackburn points out how this principle applies to the case of a bill of lading and a charter-party, and refers to *Thompson* v. *Doming* (2). In that case reference is made to the judgment of Buller J. in *Lickbarrow* v. *Mason* (3), at page 75, where he says: "No special action on the bill of lading has ever been brought; for if the bill of lading transfer the property, an action of trover against the captain for non-delivery, or against any other person who seizes the goods, is the proper form of action. If an action be brought by a vendor against a vendee where a bill of lading has passed, the proper action is for goods sold and delivered." It is therefore clear that apart from the Bills of Lading Act the bill of lading did not constitute a contract between the plaintiff and the defendant. It is plain that the Act does not apply unless the property passed by the bill of lading. In order to dispose of this question, and because the date at which the property in the cargo passed to the defendant is of vital importance in every part of the case, I shall deal with this matter now. It is strange that it does not appear to have been dealt with in the judgments in the King's Bench Division, although Dodd J. apparently held that the Act applied.

(1) 10 A. C. 74. (2) 14 M. & W. 403.
(3) 2 T. R. 63, at p. 75.

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The following are the leading facts and documents bearing on this question:—On the 6th July Russell wrote defendants: "Kindly note s.s. 'Temaire' will load your next cargo . . . on Friday. She is not suitable for Ringsend dock, but we presume you will arrange to take her to railway berth." On the 8th: "We confirm wiring you this afternoon that s.s. 'Temaire' was being delayed." On the 10th wire: "'Temaire' now loading, will sail 4 p.m.," and letter to same effect. On the same day they send invoice of cargo, 479 tons, s.s. "Temaire." On Monday, the 12th, the cargo is by direction of plaintiff tendered to the defendants and accepted by them. On the same day wire: "'Temaire,' please do utmost to clear to-night, avoid demurrage." I confess I cannot see the least doubt that the cargo of the "Temaire" was unconditionally appropriated to the contract by the seller, and that the assent of the buyer is shown by the defendants' letters of the 10th of July: "The 'Temaire' will be for the railway berth"; and of the 12th (after arrival): "We are in great trouble about the 'Temaire.' She has not yet got to work"; and is also shown by their conduct through their stevedore in his interview with the captain on the 12th. I am therefore of opinion that under sect. 18, rule 5, sub-s. 1, of the Sale of Goods Act, 1893, the property passed on the 12th. I should also hold that it passed on the 10th, as the buyer's assent could be given after the appropriation. I am further of opinion that under sect. 18, rule 5, sub-s. 2, the delivery of the coal to the ship for the purpose of transmission to defendants on the 10th was an unconditional appropriation, and that the property then passed. The judgment of Kennedy L.J. in *Biddell* v. *Clemens Horst Co.* (1) (adopted by the House of Lords (2)) is specific as to this. At pp. 955–6 he says: "At the port of shipment—in this case San Francisco—the vendor ships the goods intended for the purchasers under the contract. Under the Sale of Goods Act, 1893, sect. 18, by such shipment the goods are appropriated by the vendor to the fulfilment of the contract and by virtue of sect. 32 the delivery of the goods to the carrier—whether named by the purchaser or not—for the purpose of transmission to the purchaser is prima facie to be deemed to be a delivery of the goods to the purchaser." This latter proposition as to delivery means of course as between the

(1) [1911] 1 K. B. 934. (2) [1912] A. C. 18.

vendor and the purchaser. I cannot find any evidence of any reservation of the jus disponendi by the vendor. The bill of lading only came into existence on the 14th July; it does not appear at what hour, but it was only delivered to the purchaser on the 15th. As the property passed on the appropriation, it is plain that it did not pass by the bill of lading, and that the Act did not apply.

I proceed with the case on the basis that the property in the coal had vested in the defendants prior to the arrival of the ship in Dublin. There were undoubtedly two contracts in the case—(*a*) a contract between Russell and the defendants—the contract of sale; (*b*) a contract between Russell and the plaintiffs—the charter-party. The question is: Was there a third contract between the plaintiff and the defendants—the bill of lading not being such a contract? If the Bills of Lading Act does not apply, there is no question of the transfer of a contract to plaintiff or defendants. What we must find is a substantive independent contract between them, that is we must find—1, a promise; 2, to the plaintiff; 3, by the defendants, and 4, a consideration, 5, moving from the defendants; 6, to the plaintiff.

Mr. Andrews in his able argument contended that there was on the 26th June a complete contract by the defendants to pay the plaintiff 15*s.* per hour demurrage; but as there was no promise by anyone to the plaintiff until the execution of the charter-party on the 6th July, I think he must have meant that on the 26th June the defendants had authorized Russell to make such contract on their behalf. There are three periods in this case:—1. The period prior to the arrival of the ship in Dublin; 2. The period during which the ship was in Dublin; 3. The subsequent period. As to the first, there was no communication of any sort between the plaintiff and the defendants during this period. The only evidence of any promise to the plaintiff by anyone during this period is the charter-party. The defendants were no party to this, and as far as appears in this case never saw it or any copy of it until after the commencement of the action. It is a contract on the face of it between Russell and the defendants as principals, and was certainly a contract between them as such. Was it also, as to the whole or any part of it, a contract by Russell as agent for the defendants

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duly authorized on their behalf? Mr. Andrews contended that so far as it contained a contract to pay demurrage in Dublin it was. He declined to say whether the whole charter or any portions of it were made by Russell as such agent. The clause in the charter-party dealing with this matter is in these words: "Demurrage at the rate of 15*s.* per hour to be paid for all detention over the specified time for loading and discharging except in case of accidents, etc." In my opinion it is simply absurd to suggest that Russell made the entire charter as agent for defendants as well as for himself as principal. It is almost equally absurd to suggest that he made the above provision in this double capacity. What is contended is that at all events he entered into the above stipulation as principal as to the whole of it, but as agent for defendants only, with the word "loading" struck out. Next there is no pretence for saying that Russell ever intimated to the shipowner that he was making this contract in any capacity except as principal. There is not one scrap of evidence that Russell ever purported to make any promise to shipowners on behalf of Wallace or anyone else. There is no evidence that the shipowner ever even suspected that Russell was acting as agent in the matter for anyone. But the matter does not rest on the absence of evidence. It is a matter of specific proof by Thomson, the plaintiff's manager, who says: "The charter was signed by Dougall Stirrat, ship brokers, Glasgow, acting for the plaintiff. They had authority from us. Russell & Co. signed as charterers." How the plaintiff can contend that Russell signed as agent for Wallace I fail to understand. Finally Russell himself was called, and he never even suggested that he ever made or had authority to make any contract as agent for Wallace with the shipowner. If it was a contract between Wallace and the shipowner, it must have been a contract between the shipowner and Wallace. Could anyone suggest that Wallace could have sued the shipowner on any clause in the charter-party? Russell not having purported to act as agent, there can be no question of ratification by Wallace: *Keighley* v. *Durant* (1). But I am further of opinion that there is absolutely no evidence that Wallace ever authorized Russell to make any

(1) [1901] A. C. 240.

contract on his behalf. There is no evidence that the charter-party or any part of it was made by him as such agent. The contrary is proved.

Further, what consideration was there moving from plaintiff to Wallace? Is it suggested in the face of *Keighley* v. *Durant* (1) and the evidence of Thomson, that the plaintiffs incurred any liability to Wallace by signing the charter believing it to be, as it was, simply a contract between them and Russell as charterer, particularly as there is no evidence that the plaintiffs ever knew of the existence of Wallace or of the terms of his contract with Russell? There is no evidence of any other promise to the defendants during this period. I am of opinion therefore that, even assuming that Russell had authority to execute the charter-party as agent for Wallace, he never did so. There being no evidence of any other promise to the defendants during this period, I find as a fact that prior to the arrival of the ship in Dublin there was no contract by Russell to pay demurrage at 15*s.* per hour to plaintiff. I am further of opinion that there was no proof, and indeed no evidence, of any authority from Wallace to Russell to make any contract on his behalf or as his agent. The burden of proving such authority rests on the plaintiff. Russell is called and does not suggest it.

Dodd J. points out several times in his judgment that the shipowner was not in default or to blame in this matter. This, no doubt, makes one sympathize with him, but it does not establish either a contract made by or an authority to make a contract given by the defendants. The main topics relied on before us, and as I gather in the King's Bench Division, as proof of authority in Russell to make the charter-party as agent for Wallace, were—first, a clause in Russell's contract with Wallace, and a corresponding clause in his charter-party with plaintiff; secondly, correspondence between Russell and Wallace as to rate of demurrage. As these were so strongly relied on, I must deal with them in detail. I shall refer to Russell's contract with Wallace as "A," and to the charter-party between Russell and the plaintiff as "B." (A) Russell contracts with defendants to sell and deliver at Dublin coals at "22*s.* per ton net, less 1*s.* per ton for discharging."

(1) [1901] A. C. 240.

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This is for doing work which a shipowner would be bound to do under ordinary circumstances. This implied a contract that defendants should have an opportunity of discharging the ship. If the shipowners refused to allow him to discharge, defendants would have right of action on A against Russell for the loss he sustained by his breach of contract; (B) accordingly, to protect himself against this, Russell makes the shipowner plaintiff, contracting with Russell thus: "The consignees to discharge the cargo at the current rate of 1*s.* per ton, which is to be paid by the steamer, and to have the use of her donkey engines, steam winches, winchmen and gear." Now, if anything is clear it is clear that the plaintiff could not sue defendants on contract A, and that the defendants could not sue the plaintiff on contract B. If the plaintiff refused to perform contract B, Russell, and Russell alone, could sue him for the breach.

Dodd J. lays great stress on the fact that the defendants accepted the use of the donkey engines, steam winches, winchmen, and gear. I presume he treats this as proof that the defendants were bound by all the provisions of the charter-party, including the demurrage clause. I fail to see how it can be such evidence, but, as a matter of fact, it is proved clearly by the evidence of the captain, of Captain Webb, and the second submission of Mr. Brown at the close of the case, that the ship was discharged by the shore electric or hydraulic cranes and not by the donkey engines and winches and gear of the ship, and that the defendants, therefore, never accepted the service. But even if they had done so, it would, in my opinion, be no evidence of a contract by the defendants to pay demurrage to the plaintiff. But there was no breach of either contract. The plaintiff performed his contract "B," and allowed the defendants to discharge the ship. Russell performed the contract "A," and in the adjustment of accounts the defendants were allowed the 1*s.* per ton. The mode in which it was worked out was this:—On the 10th July Russell sent an invoice to defendant—

479 tons at 22*s.*, ...	£526	18	0
Less freight at 5*s.* 9*d.*, ...	137	14	3
	£389	3	9

This sum defendants paid Russell, and Russell never suggested he was entitled to more. Defendants proceeded to settle the freight account with the plaintiff. The plaintiff sent a note in these terms—

Freight 479 tons at 5*s.* 9*d.*, ..			£137	14	3
Discharging, ...	£23	19	0		
Dues, ...	5	12	3½		
Reptg. and trams, ...	0	13	0		
			30	4	3½
			£107	9	11½

The £23 19*s.* was the 1*s.* per ton. The dues and tram were payments for the plaintiffs' use in Dublin.

The defendants paid the plaintiff the £107 9*s.* 11½*d.* The result was the same as if the defendants had paid Russell 21*s.* per ton, they (defendants) having discharged the cargo. I confess I wholly fail to see how this transaction is the slightest evidence that Russell executed the charter-party as agent for Wallace or that he had any authority to do so.

The second matter relied on I shall now deal with. (A) Defendants contracted with Russell "steamers to be discharged within twenty-four hours." If the steamer was kept longer, defendants would be liable to Russell for the loss he sustained by this breach of contract. (B) Russell in charter-party contracted with plaintiff in similar terms, but added demurrage at the rate of 15*s.* per hour to be paid for all detention over specified time. I need not repeat what I have said in the previous case of the two contracts. The measure of damages for breach of "A" would be the loss Russell sustained. Prima facie, this would be the demurrage he would have to pay the ship. Wallace plainly had a direct interest—that this should be as small as possible. The correspondence shows that he urged Russell to try and keep it as low as he could in his contracts with ships. It must be borne in mind that twelve cargoes were contemplated. He suggested 12*s.* 6*d.* as a reasonable rate. This would be evidence as to the measure of damages if Russell had to pay the ship, and sued Wallace for damages for breach of contract A. But, as Gibson J. points out, it is plain that Wallace never agreed that 15*s.* per hour should be the measure of damages.

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I can find no evidence in the case that he knew of this figure until he saw the charter-party, unless he could have inferred it from the demand of £27 in the plaintiffs' letter of the 15th July. When he received this letter he had the bill of lading, but this did not mention demurrage at all. I confess I find it impossible to see how this correspondence between Wallace and Russell as to the rate of demurrage is any evidence of a contract between Wallace and the plaintiff for the payment of 15*s.* per hour by Wallace to him or of authority from Russell to Wallace to make such a contract on his behalf. Wallace's letter of June 26th said: "We to pay reasonable rate of demurrage, say 12*s.* 6*d.* an hour, should steamer be delayed in discharging after twenty-four hours, commencing from arrival in berth." Dodd J. says: "In mercantile dealing this letter amounts to this, the merchant says to the shipper—'in making your contract with the ship, stipulate for a reasonable rate of demurrage, say 12*s.* 6*d.* an hour.' That does not bind the shipper to 12*s.* 6*d.* It is an authority to the shipper to contract with the ship, that the merchant will pay demurrage at a reasonable rate."

Does this letter mean, "We hereby authorize you to enter into contracts on our behalf with any ship-owners you employ to carry any of the twelve cargoes of coal (this was the number contemplated by the contract, 6,000 tons in three months four or five shipments monthly, roughly twelve cargoes), that we will pay them 15*s.* per ton demurrage." It was part of the negotiation of the contract between Wallace and Russell; nothing more. If Dodd J. meant that, by mercantile usage it should be construed as an authority to make contracts with third parties, on behalf of Wallace to pay them 15*s.* demurrage, all I can say is that this is not, in my opinion, its construction according to law; and there is no evidence of any mercantile custom, and that I never heard of it before. On this I would refer to and respectfully adopt the judgment of Vaughan Williams L.J., in *Biddell* v. *Clemens Horst Co.* (1).

I now come to the second part, i.e., the period during which the ship was in Dublin; but I must first point out the position of the parties under the contracts and the nature and operation

(1) [1911] 1 K. B. at p. 944.

of the c.i.f. contract, the charter-party, and the bill of lading. In one respect this period is of importance, as it contains the only evidence, apart from the documents, of anything that passed between the parties, except the direction to the captain to deliver the cargo. Defendants never had any interview with Russell. There is no evidence of any interview between Russell and plaintiff. In the case of *Arnhold, Karberg, & Co.* v. *Blythe, Green, Jourdain, & Co.* (1), Scrutton J. says that "a c.i.f. sale is not a sale of goods but a sale of documents relating to goods." However, in the same case in the Court of Appeal (2), Bankes and Warrington L.JJ. expressly disapprove of this statement, and lay down that it is a sale of goods. In the last edition of his work on charter-parties, Scrutton L.J., does not dissent from their statement, but says it is only a difference of language. The nature of the c.i.f. contract is fully explained in the judgments of Hamilton J. and Kennedy L.J., in *Biddel* v. *Clemens Horst Co.* (3); the judgment of the latter was adopted by the House of Lords in 1912 A.C. 18.

It is obvious that the policy of insurance is the vital document. Kennedy L.J., at p. 960, cites with approval the statement of Martin B., in *Tregelles* v. *Sewell* (4): "The purchaser was to have a policy of insurance, which is usually considered as equivalent to the goods." A c.i.f. contract without the policy is absurd. In the present case Russell never suggested a policy. On the contrary, "the documents" to be sent did not include a policy. See his evidence.

It is plain, therefore, that there was no intention to perform this contract as a c.i.f. contract, and therefore it was intended to be performed as an ordinary contract for sale by actual delivery of the goods. What in such a case is the use of a bill of lading to the purchaser? Kennedy L.J. says, at p. 958: "As the bill of lading with its accompanying documents comes forward by mail (i.e. is delivered), the purchaser obtains the privilege and absolute power of profitably dealing with the goods days or weeks, or perhaps, in the case of shipments from a distant port, months before the arrival of the goods themselves. This is indeed the essential

(1) [1915] 2 K. B. 379, at p. 388.
(2) [1916] 1 K. B. 495.
(3) [1911] 1 K. B. 214 and 934.
(4) 7 H. & N. 578.

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and peculiar advantage which the buyer of imported goods intends to gain under the c.i.f. contract according to the construction which I put upon it." On the other hand he says: "The delivery of the bill of lading operates as a symbolical delivery of the goods," and he quotes the often quoted statement of the law by Bowen L.J., in *Sanders* v. *Maclean* (1), viz.: "A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading by the law merchant is universally recognized as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

Having regard to the course taken by Russell and accepted by Wallace, it is plain that neither party acted on the c.i.f. claim as a mode of performing the contract. It was quite competent to Russell to put the coals into a ship of his own or to hire a ship for the purpose, and take them over and deliver them to Wallace. Wallace would be bound to take the coal, and pay for it, as provided by contract. He would also be liable to Russell to pay damages for detention if he detained the ship beyond the time specified. If he discharged the ship, he would be entitled to deduct the 1*s.* per ton; if Russell declined to allow him to discharge, he could have counter-claimed for the loss he sustained by this refusal. Once the cargo was received nothing remained but the adjustment of the account between Wallace and Russell, and

(1) 11 Q. B. D. 327, at p. 341.

payment of amount due, as provided by contract. Instead of doing this Russell puts the coal into the plaintiff's ship, and directs the plaintiff to deliver the cargo to Wallace, and the plaintiff does so, and sails away. Can it be suggested that Wallace would have been justified in declining the captain's unconditional offer to give him the coal, Russell having told him he was sending it by this ship?

When the defendants received the coal, Russell's part of the contract was performed by actual delivery on shore, as he directed should be done. What operation has the subsequent delivery of a bill of lading to Wallace in such a case? There was no contract between Russell and Wallace but the one. Wallace was to get his cargo in Dublin, pay 22*s.* per ton, and whatever damages Russell sustained by failure to discharge in twenty-four hours. This was Wallace's entire liability. Did Wallace ever contract with anyone to undertake further liability? What consideration was there for a further contract by him? By the cesser clause he was probably discharged from liability to recoup Russell for demurrage, for Russell was discharged from liability to pay it. Russell had no right to impose on Wallace a bill of lading which would impose on him a further liability. Let us see what the contract on his part would have been on this bill of lading.

Wallace knew nothing of the charter-party. He could not tell what liabilities he might incur under the "all other conditions as per charter-party" on the bill of lading He was under no obligation to undertake any liabilities to plaintiff. No one could tell what liabilities the bill of lading imposed until he had seen and construed the charter-party, and then ascertained how much of it was incorporated in the bill of lading. This was the contract which the King's Bench Division have found that Russell made. The bill of lading did not mention demurrage at all; if it incorporated any part of the demurrage clause in the charter-party, it must have included the whole. It unquestionably incorporated the whole lien clause and the whole demurrage clause. Beyond all doubt "demurrage" in this clause includes demurrage or detention at the port of loading. As the charter-party says: "Demurrage at the rate of 15*s.* per hour to be paid for all detention over the specified time for loading and discharging."

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It includes "dead freight." The obligation was to load "a full and complete cargo."

Wallace was aware that there was some delay at Glasgow about the "Temaire." He did not know whether there was any demurrage at the port of loading; there may have been: *Kish* v. *Taylor* (1). He had noticed that the "Temaire" was too big for the Ringsend Dock. He did not know whether she had a full cargo. There may have been a clause for dead freight, for all he knew. The contract in the bill of lading would have made him agree to the ship having a lien against him for demurrage at the port of loading, and for dead freight, and the cesser clause in the charter-party would have further informed him that this lien was the shipowner's only remedy for his claims.

It was, therefore, a bill of lading on which, if properly advised, he should not have acted; and if he had been induced to accept the cargo under it, and thereby be bound by its terms, it might have transferred to him serious liabilities of Russell's, from which the latter was discharged by the cesser clause. If there were no dead freight and no demurrage at the port of loading, still Wallace did not know this, and in any event it was wholly unjustifiable to attempt to make him liable on such a contract. It is actually sought to make him liable for 15*s.* per hour, for not one penny of which he was at the time under liability to pay, and which liquidated sum he was never liable to pay. Having regard to the fact that the Judges in the King's Bench Division did not notice the lien and cesser, and the terms of the demurrage and dead freight clauses, I do not think they realized what the words "all other conditions" implied. The shipowner had no notice or knowledge of Russell's contract with Wallace, and, therefore, would have been justified in enforcing the actual contract in the bill of lading for the full lien for demurrage at both ports, and dead freight. These facts show that a Court should carefully examine the evidence before holding a man who purchased goods under a separate contract, which included delivery, bound by further serious liabilities for which there was no consideration, and which he certainly never intended to assume.

Gray v. *Carr* (2) clearly shows that the bill of lading in this case incorporates the provisions as to demurrage at Glasgow as

(1) [1912] A. C. 604.

(2) 6 Q. B. 522.

tribunal, and by inducing the Court to give its decision within the forty days; or they could deprive the party of the right to go to either Court, by nominating some other body or person in the rules, and obtaining a decision within the forty days. Sect. 30, sub-s. 10, of the Act of 1875 altered all this. As Chitty J. said in the *Royal Liver Case* (1), it is "a permissive section, giving the member the right to resort to the County Court or to the Court of summary jurisdiction, but, again, not conferring exclusive jurisdiction on those Courts. The effect of the section is, that if there should be found in the rules a provision ousting the jurisdiction of the County Court or of the Court of summary jurisdiction, that provision is not to take effect against the statutory enactment. The statutory enactment, therefore, overrides any rule which provides that the member may not go to the County Court, or may not go to the Court of summary jurisdiction." This, in my opinion, means going to the Court as a Court in the ordinary way, and does not mean going to the Court acting as an arbitrator appointed by parties.

A rule that where the party goes to the County Court or the Court of summary jurisdiction in cases in which jurisdiction is given directly to the tribunals by the statute, the decisions shall not be subject to appeal would in my opinion be void. It would be equivalent to saying that the statute should not confer the jurisdiction it purported to confer. It would be a contract directly ousting the jurisdiction of the Court.

I now come to the *Tyrone Case* (2). In that case it was held that under the Petty Sessions Acts there was a general right of appeal to the Court of Quarter Sessions, and that this right of appeal was not excluded by 59 & 60 Vict. c. 26, sect. 7. Under that section how could the society have framed its rules so as to exclude the applicant from a right of appeal from a Court of summary jurisdiction or the County Court? In one way only—by providing in the rules that the dispute should be settled by one of these tribunals. Sect. 68, sub-s. 1, of the Friendly Societies Act, 1896, would then apply, and the last clause would prevent the appeal. The Court would be simply an arbitrator. In such a case sect. 68, sub-s. 6, would not apply

(1) 35 Ch. D., at p. 336. (2) 44 I. L. T. R. 147.

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if the decision was made within forty days. In cases within sect. 68, sub-s. 6, there can, I think, be no doubt as to the right of appeal. The jurisdiction is clearly given to the Court qua Court. The substitution clause, "if the parties thereto consent," in s. 68, sub-s. 5, and the reference to the Arbitration Act, 1889, in s. 68, sub-s. 7, show strongly the persistence of the "arbitration" principle where the tribunal is selected under the rules or by the parties.

The Collecting Societies Act, sect. 7, took away the right of preventing appeals. Under sect. 68 of 59 & 60 Vict. c. 25 (the Friendly Societies Act of 1896) the Court of summary jurisdiction had no jurisdiction except under the rules or under sect. 68, sub-s. 7. It cannot be contended that the jurisdiction under s. 68, sub-s. 7, is a jurisdiction as arbitrator. The application in the *Tyrone Case* (1) was under sect. 68, sub-s. 7, or under sect. 7 of the 59 & 60 Vict. c. 26; it could not be contended that it was to the Court qua arbitrator. It cannot have been under sect. 68, sub-s. 7, if the rules contained direction as to disputes, and plainly was not a case of no decision for forty days. It could not have been under the rules unless the rules prescribed "summary jurisdiction."

The plaintiff is dominus litis. Can he apply to the Court of summary jurisdiction in the ordinary way, and after the decision say, if the decision is against him, "I elect to treat this as a case under the ordinary jurisdiction, and the decision is not final"? Can he also say, if the decision is in his favour, "I elect to treat this as a case under the rule, and you, the defendant, cannot appeal"? I cannot accept any such absurd proposition. The common sense, and in my opinion the common law, principle is that when a man invokes the jurisdiction of one of the ordinary tribunals of the country in the ordinary way, he must, in the absence of evidence to the contrary, be taken to invoke the ordinary statutory jurisdiction of the Court qua Court, and not a special power given to it to act as arbitrator under the rules of a particular association.

I wish to point out here that the consequence of omitting to include in the rules a matter directed to be provided for by the Act apparently is not to make the rules void as not

(1) 44 I. L. T. R. 147.

circumstances, a jury, or whatever tribunal has to determine the facts, will always find that there was such a contract. But it must be borne in mind that it is only by reason of his lien that the shipowner is entitled to refuse delivery to the owner of the goods or his agent, and I think that the abandonment of this right is an essential element in the facts which give rise to the inference of a contract to pay the freight." In that case there was a bill of lading purporting to make the consignee liable for freight, and the defendants were the holders of the bill of lading, and claimed delivery under it. They had no other title to the goods. Even under these circumstances, as there was no abandonment of the lien, Lord Herschell and the other Lords held that the facts did not give rise to the inference of a contract. As the Lord Chancellor said, the abandonment of the lien is an essential element in the facts which give rise to the inference of a contract. Dealing with *Cook* v. *Taylor* (1), Dodd J. says :—" Mr. Brown says that there was a consideration for the new agreement ; the ship had a lien for freight. Lord Ellenborough does not put it upon that ground. But let that pass. Mr. Brown says it does not apply to demurrage, as there is no lien." It is to be regretted that the attention of the Court was not called to the fact that the House of Lords had laid it down that the lien was the essential element. Dodd J. says in reference to *Wegener* v. *Smith* (2) : " The defendant had all through repudiated all liability." If this were so, it would be strange if the defendant were held to have contracted to pay. However, in the important case of *Lancaster* v. *Sharpe* (3) it is pointed out that in *Wegener* v. *Smith* (2) the defendant only repudiated after he had received the cargo. As the case is important on more than one point in the present case, I shall deal with it somewhat fully. It was argued by the late Mr. Justice Walton, for the plaintiff, and Mr. Carver, both eminent lawyers. The Judges were Huddlestone B. and Mathew J. The latter, as is well known, was a great commercial and shipping lawyer. The head-note is as follows :— [His Lordship read the head-note.]

It will be seen that the charter-party and bill of lading were in all material respects identical with those in the present case, except that it does not appear whether there was a cesser clause. The

(1) 13 East, 399. (2) 15 C. B. 285. (3) 24 Q. B. D. 158.

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charterer was the shipper as here. The demurrage and lien clauses were similar. The bill of lading was "to be delivered on payment of freight and other conditions as per charter-party." Here it is "all other conditions." The defendants were the consignees named. The only differences between that case and the present as to the effect of taking delivery are:—1. The defendants there had the bill of lading and demanded delivery; they offered to pay freight but not demurrage. 2. The demurrage claimed was at the port of loading, but as here the demurrage was to be paid at the specific rate in respect of delay in loading or discharge.

Mathew J. said: "Had it been proved that any part of the cargo was received by the defendants on the terms of the bill of lading, there would, in my opinion, have been ample evidence of a contract on their part to pay demurrage," i.e. demurrage sued for. That is at the port of loading. This shows the effect of the words "other conditions" in the bill of lading. He says at p. 159: "The distinction between the present case and *Wegener* v. *Smith* (1) appears to be that here the repudiation of liability took place before, there not till after the delivery of the cargo." Both Judges there decide the case that there was no contract by defendants to pay demurrage. This is only an example of the principle stated in *White* v. *Furness* (2), but it is a striking example of the necessity for proof of "the intermediate contract" as a matter of fact. It is also important as showing that the terms of the bill of lading in the present case would impose on the defendants liability for demurrage at the port of loading and dead freight.

Now as to the interview with the captain. There is not a suggestion of any reference to demurrage, or any promise to pay it. The payment of freight was not even mentioned. Neither the captain nor the defendants had ever seen the charter-party. The delivery was complete, and the vessel had left Dublin before the defendants had seen the bill of lading. The captain never saw it. The captain made no demand of freight or anything else. He had no means of knowing whether he was entitled to require defendants to pay demurrage as a condition of getting the cargo. Defendants knew that the only contract they had made was with

(1) 15 C. B. 285. (2) [1895] A. C. 40.

Russell that this cargo had been appropriated to their contract, and it was offered to them by a man who had been directed to give it to him. It was put at their disposal on the morning of Monday, the 12th.

What should Wallace have done? Should he have said, "I refuse to accept cargo until I have a bill of lading which will tell me what liabilities I shall incur by having accepted it"? If he had delayed accepting the cargo until the 15th, when he got the bill of lading, what answer would he have had to Russell's claim for damages for detention? Russell would say: "My contract was to deliver the cargo in Dublin; I sent it there, and it was offered to you without any conditions whatever, and you would not take it. You were not even asked to pay the freight, and you had full notice that the cargo had been appropriated to your contract. You did not want any bill of lading. The cargo was there for you to take, and you would not take it." What was the captain's position? He was ordered to deliver the cargo to Wallace simply. It is plain he had no orders to ask for demurrage, freight, or anything else. He did not do so. He had never seen the charter-party; there was no bill of lading for him to see. He knew he had a common law lien for freight. He had no common law lien for demurrage as against Wallace. There is not a shadow of evidence in the case that he or the shipowner knew the terms on which Wallace had bought the cargo. If he had declined to give Wallace the cargo on the Monday, what answer would the shipowner have had to an action for trover, the proper remedy since *Lickbarrow* v. *Mason* (1) at all events? He could have asserted the lien for freight. As Lord Herschell points out, that would be the only defence. There is no evidence that he even knew the amount of the freight. Wallace knew it from the invoice only. He also knew that the colliery certificate clause in his contract prevented him from declining to accept the cargo until he had examined it. The fact is that Russell was anxious to get the ship off in order to escape demurrage at 15*s.* per hour at the port of loading, and induced the shipowner to direct the captain simply to deliver the cargo to Wallace. Russell knew he could not recover this from Wallace. His extreme

(1) 2 T. R. 63; 5 T. R. 683.

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anxiety to avoid 15*s.* per ton demurrage in Dublin leads me to believe that he also knew he could recover these damages from either, as the cesser clause relieved him from liability to ship. I don't think he understood the effect of the bill of lading when he sent it. Probably there was no dead freight, and possibly no demurrage at Glasgow. But this does not affect the principle. The question of contract is a question of fact. Lord Herschell says the abandonment of the lien for freight is an essential element in the facts which give rise to the inference of a contract to pay the freight. Similarly the abandonment of a lien for demurrage at a fixed rate might justify an inference of a contract to pay the demurrage. But where there was no lien for demurrage, and neither party believed there was, I fail to see how there is the slightest evidence of a contract between them to pay demurrage. At all events it is a question of fact, and I agree with Gibson J. that there was no contract between defendants and the captain that defendant should pay the shipowner 15*s.* per hour demurrage. I am still more clearly of opinion that there was no contract that they would, as provided by the bill of lading, pay all moneys due for demurrage at the port of loading and dead freight.

As to the third period. If there was no contract up to the time of the delivery of the coal to defendants, and the departure of the ship from Dublin, I find it difficult to see how there could be any contract after that date. The defendants had received their coal. Russell had performed his part of the contract. What possible consideration was there for any subsequent promise by the defendants either to Russell or to the plaintiff? But I can find no evidence of any promise. There are demands for payment and refusal on the ground of no detention. Wallace never saw the charter-party. He did not know of the cesser clause, and thought he was liable to Russell; he thought that demurrage payable to ship was the probable measure of his liability. He wanted to escape this liability, and so disputed detention. It really made no matter to him whether he had to pay it to Russell or plaintiff. This explains the entire correspondence; but it affords no evidence of a contract between defendants and plaintiff. It is plain that there was no consideration moving from plaintiff to defendants for any such contract. It is plain that the property

passed by the final delivery of the cargo on shore to Wallace, and there was nothing for the subsequent delivery of the bill of lading to operate on. It passed no property; it transferred no rights to Wallace. A bill of lading delivered to a purchaser after complete delivery of the cargo on shore cannot impose liabilities on him. There is no consideration for the promise contained in the bill of lading in such a case.

Assuming for a moment that there had been no cesser clause in the charter in this case, and that Russell was liable to the plaintiff for dead freight and demurrage at Glasgow and Dublin, could it be contended that, having induced Wallace to accept the cargo, as in this case, it would then have been competent to Russell by sending such a bill of lading to impose on Wallace a liability to the ship for dead freight and demurrage at both ports, and so relieve himself. These are the terms of the contract contained in the bill of lading in this case; and it is on these terms that the King's Bench Division has held that the cargo was received. It is unnecessary to decide in this case whether there was a contract between Wallace and the captain to pay the freight to the latter. Apart from this there is in my opinion nothing in the entire case from which it can be inferred that Wallace ever made any contract except his original contract with Russell; and I find as a fact that he did not do so. Though not argued before us, there is another ground of liability apparently suggested in the judgment of the King's Bench Division, that is, that Wallace had notice of the contents of the charter-party, and of the bill of lading, when he received the cargo; and that he is, therefore, bound by these contracts.

The judgment says: "There is no implied promise to pay demurrage if the consignee has no notice of the terms of the contract of the consignor." It had already contained the following statement: "But in all the cases stress is laid as regards the consignee on the question—'Had he notice of the terms upon which he was to accept the cargo?' He could have notice, either by having a copy of the charter-party or bill of lading, or he could have notice independently. This matter of notice is the beginning, middle, and end of commercial law. It was to this question of notice that Mr. Justice Willes and Mr. Justice Brett directed all

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their energy in the leading case of *Gray* v. *Carr* (1), where it was sought to make the consignee liable, not only for demurrage at the port of unloading, but also liable for demurrage at the port of loading."

I shall deal with the case referred to presently; at present I wish to state that in my opinion there is no foundation for the statements as to the effect of notice. The consignee is bound by the bill of lading if he claims and accepts the cargo under it without protest, or if the Bills of Lading Act applies and operates so as to vest the cargo in him. He is in no way bound by notice of the charter-party. He is bound by so much of it as is incorporated in the bill of lading, because it thereby becomes part of the bill of lading. The consignee is liable on his own contract. He does not become liable on the contract in the charter-party by getting notice of it.

I think the settled law is as stated at p. 175 of vol. xxvi of Halsbury (article 264), thus: "As between the shipowner and the charterer the contract of carriage is contained in the charter-party; as regards other persons it is to be found in the bill of lading. The terms of the charter-party are not as such binding either on the shipper, where he is not the charterer, or on the consignee or indorsee of the bill of lading, whether he knows of them or not, though his knowledge of them precludes him from relying as against the shipowner on a bill of lading, which is outside the master's actual authority. The terms of the charter-party may, however, be incorporated in the bill of lading by express reference; and in this case they become terms of the contract contained in the bill of lading, capable of being enforced by or against the shipper, consignee, or indorsee, as the case may be." The passage I have read from the judgment here says he could have notice by having a copy either of the charter-party or of the bill of lading. The only case referred to in the judgment on this matter is *Gray* v. *Carr* (1). The facts appear in the head-note (I may say that so far as "dead freight" is concerned, the decision of the majority has been overruled by the House of Lords in *Kish* v. *Taylor* (2)). The question arose on a case stated. The judgment here says: "It was to this [the matter of notice] that Willes and

(1) L. R. 6 Q. B. 522. (2) [1912] A. C. 604.

Brett JJ. directed all their energy in all the cases, notably *Gray* v. *Carr* (1)." Willes J. only concurred in the judgment of Brett J. It did not require much energy to find notice of the charter-party. It is difficult to see how any question of notice could have arisen in the case. The head-note states: "The defendants claimed the cargo as the consignees named in the bill of lading."

At p. 534 Brett J. says: "The defendants were the consignees of the goods named in the bill of lading, and the property in the goods vested in them, upon and by virtue of the consignment." This is evidently to show that the Bills of Lading Act applied, and that the consignee was bound by the terms of the bill of lading. But it is remarkable that those words are taken from paragraph 14 of the case stated (p. 526 of Report), and the paragraph proceeds: "The defendants had no notice until the arrival of the ship in London of the said claims of the plaintiff [i.e., claims for demurrage at port of loading, &c.]; but a copy of the charter-party had been sent to the defendants with the original bill of lading." But in the judgment, Brett J., when taking the words of clause 14, reads those applicable to the Bills of Lading Act, and ignores the only words in the case which prove the notice of the charter-party. So far from Brett and Willes JJ. "having directed all their energy" to the question of notice of the charter-party, I have not been able to find the least reference to the subject in any judgment in the case. Indeed, once the Bills of Lading Act applied, it would seem to be a mere question of construction of the bill of lading and charter-party.

Brett J. says: "A bill of lading was signed by the captain for 283,682 staves to be delivered at the port of discharge as per charter-party, unto order or assigns, he or they paying freight and all other conditions, or demurrage if any should be incurred, for the said goods as per charter-party." All judgments in the case are clear that the only questions were as to the construction of the two documents. Brett J. having stated the facts, etc., went on to say: "These arguments raise two questions—namely, first, what is the construction of the charter party? and secondly, what is the construction of the bill of lading?" Having discussed the first, he says: "Even if the charter party does give to the shipowner

(1) L. R. 6 Q. B. 522.

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the alleged lien with regard to the alleged dead freight the demurrage and damages in the nature of demurrage [this means at the port of loading], is such lien imposed on the goods in the bill of lading as against the defendants, the owners of such goods, and consignees of them under the bill of lading? The answer, as it seems to me, depends entirely on the construction to be put on the terms of the bill of lading. Upon that construction alone depends the question whether there is any evidence from which a contract between the plaintiff and defendants to the effect contended for by the plaintiff can be implied."

I have dealt with this judgment in detail as it seems to be the principal case relied on by the Court below for the principle that notice of the terms of the charter-party as to delivery make an acceptance of the cargo by the consignee evidence of a contract on his part to give effect to these terms. If this were so, the second part of Clause 14 of the special case, that a copy of the charter-party was given to consignee with bill of lading, would have been conclusive irrespective of the terms of the bill of lading. I do not know to what "other cases" the judgment of the King's Bench refers; I know of no case inconsistent with the law as stated in Halsbury. No such case has been cited to us. Even if notice were a ground of liability, what evidence is there that defendants had notice of the contents of the charter-party? They never saw it or a copy of it, and there is no evidence that anyone ever told them what was in it. We are told that constructive notice is not to be applied to commercial transactions. Actual notice here, there was none. Has constructive notice in its most extreme cases ever gone the length of imputing to a man notice of such a complicated contract as would arise from the incorporation of the charter-party in the bill of lading in this case, when he was ignorant of the terms and contents of both, and at a time when one was not even in existence? I must respectfully decline to accept the propositions that Wallace must be taken to have known terms that would be adopted in the charter-party and bill of lading, and I find as a fact that when he agreed with the captain to take, and when he took, delivery of the cargo he had no notice of the terms of the charter-party or of the bill of lading.

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MOLONY L.J.:—

In the month of June, 1915, the defendants entered into a contract with Messrs. William Russell and Sons, of Glasgow, for the purchase of 6,000 tons of Summerlee Hamilton Ell coal at 22*s.* per ton net, c.i.f. to Dublin, less 1*s.* per ton for discharge of steamer, to be discharged in twenty-four running hours from arrival.

The contract note, which bears date the 26th June, 1915, contains no statement as to the rate of demurrage, but in a letter of the same date to Messrs. Russell & Sons the defendants intimated that they would pay a reasonable rate of demurrage, say 12*s.* 6*d.* an hour, should steamers be delayed in discharging after twenty-four hours. Under the contract it became the duty of Messrs. Russell & Sons to arrange for the shipment of the coal, and on the 5th July, 1915, a charter-party was entered into between the plaintiff, trading as the Eirinn Steamers Co., and Messrs. Russell & Sons to load the s.s. "Temaire" with a complete cargo of coal, and to proceed to Dublin and there deliver the same to the freighter or his assigns as might be directed. The charter-party contains the usual provisions, including cesser clause, and provides for demurrage at the rate of 15*s.* per hour to be paid for detention over the specified time of twenty-four running hours.

The "Temaire" was duly loaded, and left Glasgow on the 10th July, 1915, and arrived in Dublin at 5 o'clock on the following evening. She was placed at the defendants' disposal at 7 o'clock a.m. on the 12th July, 1915, but the discharge was not completed until 7 o'clock p.m. on the 14th July, when the steamer left for Glasgow, and the plaintiff claims for thirty-six hours' demurrage calculated at 15*s.* per hour, amounting to £27. The plaintiff seeks to make the defendants liable for such demurrage, on the ground that the cargo was received by them on the terms of a bill of lading, dated 10th July, 1915, while, on the other hand, the defendants contend that they did not receive the bill of lading, and were not parties thereto, and they deny that they had any knowledge or notice thereof.

The bill of lading, which purports to have been signed for the master by R. Henderson at Glasgow on the 10th July, 1915,

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provides for "freight to be paid by consignees at the rate of five shillings and ninepence sterling per ton of 20 cwt. on the whole being delivered, and all other conditions as per charter-party. With average accustomed." These words are almost precisely the same as the words which were considered in *Porteus* v. *Watney* (1), where it was held that the consignees were liable for demurrage stipulated for in the charter-party. As Thesiger L.J. in that case said—"By the terms of the bill of lading the consignee is only to receive the goods on the payment of freight for them, and on the fulfilment of all other conditions as per charter-party. Among those conditions is that by which the shipowner stipulates for payment of demurrage at a fixed rate, in the event of the vessel carrying the goods being detained beyond the working days allowed by the charter-party. The language used, if construed according to its natural meaning, imports a liability on the part of the consignee for demurrage, co-extensive with the liability of the charterer, and the Court ought not to depart from what is the natural meaning of words selected by the parties to the contract unless compelled by strong reasons or distinct authority." It is clear on the authority of this case, which follows the earlier cases of *Wegener* v. *Smith* (2), *Smith* v. *Siveking* (3), *Gray* v. *Carr* (4), that the defendants would be clearly liable in the present case once it was established that they accepted delivery of the cargo under the bill of lading.

The case of the defendants, however, is that they never heard of the bill of lading until the 15th of July, when not only had the vessel completely discharged her cargo, but had returned to Glasgow, and they never heard or knew of the charter-party until long afterwards.

It was proved at the trial that the bill of lading was made out on the 12th July by Russell & Co. in Glasgow, and sent to the plaintiff in Edinburgh, who had it signed by his shipping clerk, and returned it to Messrs. Russell on the following day. Messrs. Russell posted it on the 14th July to the defendants, who duly received it on the morning of the 15th July.

(1) 3 Q. B. D. 534.
(2) 16 C. B. 285; 24 L. J. (C.P.) 25.
(3) 4 E. & B. 945; 24 L. J. Q. B. 257.
(4) L. R. 6 Q. B. 522.

The master of the ship, who was examined, stated that he had no bill of lading, and added, "It is generally done without." He apparently was not in the habit of seeing them, as he said, "It is sent to the consignees signed by someone else." He did not trouble himself about the bill of lading, as he was told in a telephone message from the plaintiff before he left Glasgow that the defendants were to get the cargo. It is, therefore, abundantly clear that at the time of the delivery of the cargo at Dublin to the defendants neither the master of the ship nor the defendants were in any way relying on a bill of lading, and that consequently it cannot be asserted that the defendants took delivery of the cargo under the bill of lading. It is, however, sought to make them liable on the ground that after the bill of lading had come to hand on the 15th July they did not repudiate it or object to it. Mr. Hanna argued very strongly that it was the duty of the defendants on receiving the bill of lading to repudiate it, and that, having kept it, they are to be deemed to have adopted it. It is, however, clear from the correspondence that the defendants never at any time accepted liability for demurrage. They sent a cheque for the freight, but they ignored several letters of the plaintiff asking for the demurrage, and when, on the 5th October, 1915, Messrs. Carson & McDowell made a formal demand for the demurrage, the defendants replied on the following day to the effect that the owners were evidently labouring under some mistake, as they had no contract whatever with them. I agree with Dodd J. in saying that the question in the present case is one entirely of fact, namely, whether the cargo was delivered by the ship and accepted by the merchant under the bill of lading, though the bill of lading had not reached the consignee before the delivery concluded; but I am not able to agree with him or the other members of the King's Bench Division in their answer. They were of opinion that the answer should be "Yes." After a careful consideration of all the evidence, oral and documentary, I am unable to find evidence which would support such an answer, and I agree with Mr. Justice Gibson in his conclusion that "the defendants did not receive delivery under the bill of lading, and are not liable for the 15*s.* an hour charged—a rate of which they never heard till afterwards."

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The property in the coal had passed to the defendants before the bill of lading came into existence. The defendants were bound to accept the colliery certificate as proof of weight, quantity, and description, and once the coal was loaded on the vessel and the certificate given, as it was before the vessel sailed, the coal was unconditionally appropriated to the contract, and there could not be a more striking confirmation of this than the telephone message which the master of the ship received from his employer, the plaintiff. I am consequently of opinion that the property did not pass to the defendants under the bill of lading, which was not received until the 15th July, and that they cannot be held bound by its terms. As regards the question of notice I agree with the observations of my colleague, Lord Justice Ronan.

It has also been contended that the letter from the defendants of the 26th June, 1915, referring to demurrage, was an authority to Messrs. Russell to make contracts for the defendants with shipowners to pay demurrage at a reasonable rate, but in my opinion it has not this far-reaching effect, and only amounts to a statement that, as between them and Messrs. Russell, they were willing to pay a reasonable rate of demurrage.

In my opinion the judgment of the King's Bench Division must be reversed, and the verdict and judgment entered up by Gibson J. at the trial, restored, with costs of the motion in the King's Bench Division, and of this appeal to be paid by the plaintiff.

C. L.

H. L.
1919.
Feb. 25.

The plaintiff appealed to the House of Lords.

Henry Hanna K.C. (of the Irish Bar) and *Sandeman K.C.* (of the Scottish Bar), for the appellant.

S. L. Brown K.C. and *Edmund Swayne K.C.* (both of the Irish Bar), for the respondents.

The House of Lords (Lord Birkenhead C. and Lords Buckmaster, Atkinson, Shaw of Dunfermline, and Wrenbury) unanimously affirmed the judgment of the Court of Appeal.

The respondents were not called on.

Solicitors for the appellant: *Blyth, Dutton, Hartley & Blyth*, agents for *Carson & M'Dowell.*

Solicitors for the respondents: *Burn and Berridge*, agents for

JAMES HOGG & SONS, PLAINTIFFS, *v.* LORD MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF BELFAST, DEFENDANTS (1).

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1919.
Jan. 22, 27.
29.
Feb. 10.

Arbitration—Staying proceedings—Contract containing arbitration clause—Action—Common Law Procedure Act (Ireland), 1856, *s.* 14—*Bias of arbitrator—Questions of law—Questions outside the arbitration clause—Discretion.*

The plaintiffs in June, 1914, contracted to erect certain houses for the defendants. The contract provided that every dispute which might arise between the parties touching the construction of the contract, or as to the rights or liabilities of either party thereunder, or in any wise relating thereto, should be referred to the defendants' surveyor, whose decision should be final. Delay occurred in the completion of the houses, which the plaintiffs alleged was owing to the failure by the defendants to give the plaintiffs possession of the sites within the stipulated time; the defendants alleged that the delay was in part the plaintiffs' fault, and that the failure by the defendants to give the plaintiffs possession of sites was owing to their compliance with the requirements of the military authorities after the outbreak of war. The defendants' surveyor had, during the progress of the works, written several letters to the plaintiffs, attributing to them delay in the carrying out of the works, and had subsequently stated that the defendants were not legally liable for losses occasioned by delays due to the war. There was a question of law on the construction of the contract as to the times at which the defendants were bound to give the plaintiffs possession of the sites.

On motion by the defendants to stay the proceedings, and to refer the matters in dispute to the defendants' surveyor;

Held, 1, That the defendants' surveyor was not disqualified to act as arbitrator. 2. That fundamental questions of law were involved which should be tried in an action. 3. (per Madden & Moore JJ.) That the matters in dispute were outside the arbitration clause.

By a contract in writing, dated the 12th June, 1914, the plaintiffs agreed to erect for the defendants 252 working-class dwellings. The contract contained the following conditions:—

Condition 20.—"The corporation will, as soon as possible after the execution of the contract, give the contractor possession of the sites of the works to which the contract refers."

(1) Before MADDEN, KENNY, and MOORE JJ.

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Condition 31.—"The contractor shall commence the works on the date of signing the contract, and finish same within twelve months of the same date, under a penalty of £1 per house for each week the works shall be delayed in commencement or completion."

Condition 42.—"Subject to the conditions hereinbefore contained, every or any dispute or difference which may arise between the parties hereto touching the construction of the contract, or as to the rights or liabilities of either party hereunder, or in anywise relating hereto, shall be referred to the City Surveyor, whose decision shall be final, and binding upon each of the parties hereto."

There was incorporated with the contract a table setting out the times at which, respectively, specified numbers of houses were to be completed, the latest of these times being twelve months from the date of the contract.

Delay occurred in the completion of the houses, which the plaintiffs alleged was the result of the failure of the defendants to give possession of sites for the houses within the time stipulated in the contract. The defendants alleged that the delay was in part the fault of the plaintiffs, and that the failure by the defendants to give the plaintiffs possession of sites was owing to their compliance with the requirements of the military authorities after the outbreak of the war, by which they were prevented from demolishing old houses on the sites of which some of the new houses were to be built. There was a question on the construction of the contract as to the times at which the defendants were to give the plaintiffs possession of the sites.

After the completion of the works the plaintiffs claimed to be entitled to damages for the defendants' failure to give them possession of the sites within the time stipulated in the contract, and alleged that by reason of that delay they had incurred, among other losses, a loss of £8,123 5*s.* 6*d.*, owing to the rise in wages and in the prices of materials, and a loss of £2,205 4*s.* 2*d.* owing to their inability to carry on the works continuously. They furnished a statement of account to the defendants, in which their total charges for works done under the contract, extras, variations, and damages for delay, amounted to £48,245

12*s.* 3*d.* The defendants had paid sums amounting to £33,739, and the balance claimed by the plaintiffs amounted to £14,506 12*s.* 3*d.*

The defendants' surveyor had written a number of letters to the plaintiffs, in which he attributed to the plaintiffs delay in the carrying out of the works, and he had stated orally and by letter that the plaintiffs' claim for losses occasioned by delays due to the war was a claim for which the defendants were not legally liable. The plaintiffs having brought an action to recover the balance claimed by them, the defendants applied under the Common Law Procedure Act (Ireland), 1856 (19 & 20 Vict. c. 102), sect. 14, that the proceedings be stayed, and the matters in dispute referred to the defendants' surveyor, and offered that the surveyor should state a special case for the opinion of the Court on the question of law at issue between the parties.

R. F. Harrison K.C., T. W. Brown K.C., and *A. Black*, for the defendants:—

The plaintiffs are bound by the agreement to refer all disputes to the defendant's surveyor, who has not been guilty of any misconduct. The plaintiffs when making the contract must have known that the surveyor would have prior views of his own on questions at issue between the parties; he is not disqualified to act as arbitrator unless it is shown that he is determined not to act judicially, or is so biassed that he is incapable of doing so. The matters in controversy are of the kind which were in the contemplation of the parties when the contract was made. They referred to *Jackson* v. *Barry Railway Company* (1); *Ives and Barker* v. *Willans* (2); *Eckersley* v. *Mersey Docks and Harbour Board* (3); *Cross* v. *Leeds Corporation* (4); *M'Kee* v. *Mayor and Corporation of Dublin* (5); *Freeman* v. *Chester Rural District Council* (6); *Hickman* v. *Roberts* (7).

(1) [1893] 1 Ch. 238.
(2) [1894] 2 Ch. 478.
(3) [1894] 2 Q. B. 667.
(4) Hudson, vol. ii, 339.
(5) Hudson, vol. ii, 466.
(6) [1911] 1 K. B. 783.
(7) [1913] A. C. 229.

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D. M. Wilson K.C., *Andrews K.C.*, and *Hume*, for the plaintiffs :—

The surveyor is expressly committed to views unfavourable to the plaintiffs' claim; it is not proper that he should act as arbitrator. The question of law is fundamental to the plaintiffs' claim for damages, and therefore should be tried in an action: *Grey* v. *Tolme* (1); *Wilson* v. *National Live Stock Insurance Company, Ltd.* (2); *Workman* v. *Belfast Harbour Commissioners* (3). A dispute as to damages for delay caused by the war was not in the contemplation of the parties when they made the contract, and is therefore outside the arbitration clause: *Lawson* v. *Wallasey Local Board* (4); *Moyers* v. *Soady* (5); *Workman* v. *Belfast Harbour Commissioners* (3). Lord Moulton said, in *Bristol Corporation* v. *Aird* (6): "There may be types of questions which, although included in the arbitration clauses, are types which, presumably, were not in the contemplation of the parties, and are not suitable from their nature to come before this domestic tribunal." If this case comes within the arbitration clause, we submit that the questions are of that type.

MADDEN J.:—

This action is founded on a contract, dated the 12th of June, 1914, between the plaintiffs, a firm of contractors, and the defendants, the Corporation of Belfast, for the erection of 252 workingmen's houses. By the writ of summons the plaintiffs claim damages for the failure on the part of the defendants to provide at proper times sites for the erection of these houses, whereby the plaintiffs were delayed and incurred much additional expense in the carrying on of the work, and damages for breach of the contract between the parties. The total amount of the plaintiffs' claim is £14,506 12*s.* 3*d.*, which it is proposed to refer to arbitration.

The case comes before us on a motion on the part of the defendants under sect. 14 of the Common Law Procedure Act, 1856, to refer the matters in dispute to the City Surveyor of Belfast.

(1) 31 T. L. R. 137.
(2) 48 I. L. T. R. 77.
(3) [1899] 2 I. R. 234.
(4) 11 Q. B. D. 229.
(5) 18 L. R. Ir. 499.
(6) [1913] A. C. 241.

This motion is founded on the 42nd clause of the contract, which is in these terms:—"Subject to the provisions hereinbefore contained every or any dispute or difference which may arise between the parties hereto touching the construction of the contract, or as to the rights or liabilities of either party hereunder, or in any wise relating hereto, shall be referred to the City Surveyor, whose decision shall be final and binding on each of the parties hereto."

This motion is opposed on the part of the plaintiffs. They contend that Mr. Cutler, when acting as City Surveyor, had prejudged and decided in favour of the corporation the disputes which it is proposed to submit to him for his decision as arbitrator, and has thus precluded himself from approaching the case in a fair and impartial manner. They further contend that if Mr. Cutler was not by his conduct disqualified from acting as arbitrator, he has become disqualified by the course of events, inasmuch as certain issues have arisen in regard to which he is a necessary witness, and thus disqualified from acting as arbitrator. Apart from the question of the personal disqualification of Mr. Cutler, they contend that the result of the arbitration depends on the decision of two general questions, neither of which is within the purview of the arbitration clause, one because it involves questions of law not proper to be submitted to arbitration, and the other because it arises from a state of facts which could not have been within the contemplation of the parties to the contract, and, therefore, could not be "in any wise relating thereto." I shall deal, in the first instance, with the question of the personal disqualification of the City Surveyor.

A clause in a building contract referring questions in dispute relating to the contract to the decision of the architect of the building owner is not infrequent. The contractor enters into such an agreement with knowledge that the architect of the building owner has probably advised his employer, and expressed an opinion on the very question in regard to which he will act as arbitrator. It is to the credit of two professions that contractors, influenced, no doubt, by the desire to obtain the particular contract, have sufficient confidence in the impartiality of the engineer to submit to a contract which places him in the position of judge.

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Contracts of this kind have often been considered by judges. In the earlier cases the tendency was to hold the parties strictly bound by the letter of the contract; but of late years judges have realized that certain classes of questions, though within the exact terms of such an arbitration clause, cannot fairly be supposed to be within the contemplation of the parties to the contract, and, in the exercise of a judicial discretion, they have refused to refer them to arbitration.

But the mere fact that the arbitrator has already expressed an opinion in favour of the building owner is not sufficient to disqualify him from acting as arbitrator, for, in the words of Bowen L.J. in *Jackson* v. *Barry Railway Company* (1), "it was part of the very bargain that the scales of justice in the case of a dispute need not be held in a neutral or wholly indifferent hand." This authority, which was acted on in several reported cases, was applied in the extreme case of an engineer, who, when acting for the building owner, had characterized a claim on which he was to decide as arbitrator as unsustainable, in very strong language.

I can find no conduct or statement on the part of Mr. Cutler by which he is personally disqualified from acting as arbitrator in the present case. I can find nothing done by him beyond what was mainly done as engineer for the building owner; and it is clearly settled that he is not disqualified from acting in arbitration because he has in this way prejudged the case.

It is further objected that, whatever the personal conduct of Mr. Cutler may have been, he has been disqualified by the course of events from acting as arbitrator, inasmuch as questions would come before him for decision in which he would be a necessary witness. If this were so, he would be disqualified by the nature of the case from acting as arbitrator. The position is thus stated by Lord Atkinson in the *Bristol Corporation* v. *John Aird & Co.* (2): "The parties must be held to have contemplated that they would have to go before a man with preformed views, but not to have contemplated that he would put himself in the position of a witness, and adjudicate under such circumstances. This is, I think, to push matters to an extreme that is unwarranted."

(1) [1893] 1 Ch., at p. 249. (2) [1913] A. C., at p. 251.

The issue upon which the plaintiffs suggest that Mr. Cutler would be a necessary witness is as to the circumstances in which delay in the execution of the works took place, and the plaintiff's claim founded on the verdict in the action of *Lowdon* v. *Hogg*, which they say was defended at the request of the defendants' engineer. In my opinion Mr. Cutler would not be a necessary witness in regard to either of these claims. The opinion which I have formed on another branch of the case renders it unnecessary to enter into these questions in detail, and I merely state the result of my examination of the evidence.

I proceed to consider the most important part of this case, that is to say the general questions underlying it, which according to the plaintiffs' case ought not to be submitted to arbitration—one, because it is an important question of law, and the other because it is outside the terms of the arbitration clause.

The first question which the arbitrator would have to decide is the date at which, on the construction of the contract, the corporation were bound to supply sites for the houses. It is evident that the questions at issue, so far as they depend on delay in giving the sites, cannot be approached until the question of the date or dates at which the sites were to be given has been decided. This is a question of law on the construction of the contract. The contract contains two clauses, and the arbitrator would have to decide as to which is the governing construction.

The plaintiffs rely on a time-table which they say is part of the contract, and on the thirty-first condition, as fixing the respective terms for the completion of the houses, and the dates at which the corporation were bound to give possession of the sites. The defendants rely on the twentieth condition, which provides that "the Corporation will, as soon as possible after the execution of the contract, give the contractor possession of the sites of the works to which the contract refers." The defendants contend that the latter is the governing clause. If this be the true construction of the contract, the question of delay in the execution of the work must be considered from the expiration of a reasonable time after the execution of the contract, this being the time at which the contractors were entitled to obtain possession of the sites. On the other hand, if the Corporation had contracted to

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give possession of each set of sites at defined dates, the delay to be considered by the arbitrators would run, in each case, from the stipulated date. It is obvious that the arbitrator could not enter upon the question of compensation for delay until the date had been ascertained from which it was to be calculated. It is equally clear that the ascertainment of this date depends upon the decision of a question of law. The circumstance that questions of law will be evolved in the course of an inquiry is not in itself a sufficient reason for refusing to send the case to arbitration under a clause like that in the present case. Where a question of law incidental to the inquiry comes up in the course of an arbitration, the arbitrator may, at the request of the parties, state a case for the opinion of this Court. The possibility, or even the probability, of such a question coming up for decision, is not always a sufficient reason for refusing to act under an arbitration clause like that in the present case. But the case is altogether different when the decision of a question of law arising upon the construction of a contract goes to the root of the whole inquiry, and this, as I have pointed out, is the case before us. Such a question is proper to be retained for decision by this Court, and ought not to be referred to arbitration. On this ground alone I am clearly of opinion that we ought, in the exercise of the discretion vested in us, to refuse the present motion. But there is another reason, equally coercive, leading to the same conclusion. The arbitrator, having decided as to the date at which the sites should have been given to the plaintiffs, would then have to adjudicate on the case made by the defendants, that the delay was due to a cause over which they had no control; that is to say, the breaking out of a European war after the concluding of the contract. The case that the delay was attributable to the action of the military authority is made in the seventh paragraph of Mr. Cutler's first affidavit of the 16th of December, 1918. It underlies the whole correspondence. It relates not only to the claim for £8,000 for increased expense of materials, but, in one form or another, to each claim of the plaintiffs' case, as the claim in respect of the loss which they sustained from not being able to proceed continuously with the work. It is clear that the consideration of the effect of the war on the completion of the

contract could not have been in contemplation of the parties, for the simple reason that the date of the contract is the 12th of June, and the date of the commencement of the war the 4th of August, in the year 1914. It is quite settled that delay when it is the result of something outside the contemplation of the parties to a contract is not a question arising under the contract, and is, therefore, outside the provisions of an arbitration clause like that in the present case.

In *Lawson* v. *Wallasey Local Board* (1), the plaintiff had entered into a contract with the defendants for the execution of certain works to be completed by a given day. There was also an implied contract on the part of the defendants that they would not be guilty of unreasonable delay in the removal of certain staging, the removal of which was necessary in order to enable the plaintiff to proceed with his work. It was held that the question of the loss which the plaintiff had sustained in consequence of unreasonable delay in removing the staging was not a difference "concerning a matter in connexion with the contract" within an arbitration clause similar to that in the present case, and this decision was followed in a case in this Court to which my brother Kenny was a party: *Workman* v. *Belfast Harbour Commissioners* (2). These cases are authorities for the proposition that delay in completion is not a proper subject for arbitration unless it is directly connected with the completion of the contract.

In my opinion the motion should be refused, with costs.

KENNY J.:—

I concur in holding that the subject-matter of this action should not be referred under the arbitration clause contained in the contract of the 12th June, 1914, and in doing so, I desire at the outset to say that no suggestion has been made in the course of the hearing, nor does any evidence in my opinion exist, that Mr. Cutler, the City Surveyor, who was adopted by both parties as the possible arbitrator between them, would conduct the proposed arbitration other than in a fair, honest, and impartial spirit. But, assuming that he would do so, and while that consideration is a very powerful one, still it is not by any means the sole test as to the exercise by the Court of the discretion vested in it by the Common Law

(1) 11 Q. B. D. 229. (2) [1899] 2 I. R. 234.

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Procedure Act. *Aird's Case* (1) is the latest authoritative decision on the question of compulsory reference, and one that presents for consideration the difficulty in reconciling the exercise of the judicial discretion with contractual rights. The difficulty is exemplified in the speeches of Lord Moulton and Lord Parker. The latter, at p. 260, says: "It appears to me to be absolutely impossible to define and certainly undesirable to attempt to define with any precision what circumstances will prevent the Court from exercising its discretionary power." In that case—just as in this—the arbitrator under the contract was the engineer of one of the parties, and there was a substantial dispute upon the settlement of the final account between the contractor and the engineer, involving a probable conflict of evidence between them. On a motion to stay an action by the contractor, the House of Lords being of opinion that the engineer without any fault of his own must necessarily be placed in the position of judge and witness, regarded that circumstance as a sufficient reason for refusing to refer the matter in dispute to arbitration. In the case before us the contractor, while repudiating the slightest reflection on Mr. Cutler's impartiality, makes the case that on one branch of the claim he has expressed a strong opinion adverse to the contractor, and in that aspect should be regarded as having prejudged a main item of the matter in dispute. I confess that if that were the sole ground for opposing a reference, it would not have that weight with me which would induce me to think that arbitration would be unsatisfactory.

There are more weighty elements in the present case. The engineer's assistant, who had special knowledge of the circumstances attending the carrying out of this contract, died in 1917, and I think it is quite impossible for us to say that the engineer might not find himself both arbitrator and witness in case we made an order of reference. Furthermore, the contract is a pre-war one, and the matters in dispute appear to have arisen largely from causes attributable to the existence of the war. There was delay in the execution of the contract. There was delay in the handing over of the sites for the houses caused by the intervention of the Government. The delay was accountable for the alterations

(1) [1913] A. C. 241.

in prices, and a consequent increase in the amount of the claim for extra works. No doubt Mr. Cutler would be a very proper person to deal with the details of the claim, but there are substantial and fundamental questions of law which the arbitrator would have to decide not only as to the effect of the war on the carrying out of the contract, but also as to whether portions of the contractor's claim are not altogether outside the contract. Finally, there is a serious question of the defendant's liability in respect of the action brought by a sub-contractor against the plaintiff.

Now, were these matters in the contemplation of the parties when they entered into the contract of the 12th June, 1914? Assuredly, the more serious of them were not, and, if so, in my opinion it would not be right for us, in the exercise of our judicial discretion, to send this case to arbitration. In refusing to do so, we are not, as Lord Moulton observed in *Aird's Case* (1), refusing to recognize the contract. At p. 257 of that case he says:—"We are carrying out the bargain between the parties, because that bargain, to substitute for the courts of the land a domestic tribunal, was a bargain into which was written by reason of the existing legislation the condition that it should only be enforced if the Court thought it a proper case for its being enforced."

Being of opinion that the present case is not one in which the plaintiff should be forced to go to arbitration, I think the defendant's application should be refused.

MOORE J.:—

The plaintiffs in this action, a firm of builders in Belfast, on the 12th June, 1914, entered into a contract under seal with the Belfast Corporation (described as the Lord Mayor, aldermen, and citizens of the city of Belfast) for the erection of 252 working-class dwellings in accordance with the tender, specification, general conditions, bill of quantities, and drawings annexed thereto.

Only 250 houses were, in fact, built, but, on the other hand, there were admitted extras, and the corporation have already paid on foot of the contract and of these extras sums amounting to £33,739.

(1) [1913] A. C. 241.

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The plaintiffs' total claim against the corporation in respect of extras and for other causes of action to which it will be necessary to allude in detail hereafter is for the difference between £33,739 and £48,245 12*s.* 3*d.*, to which they now claim to be entitled. The present action may, therefore, be taken to be for £14,506 12*s.* 3*d.*

The present application is one to refer the plaintiffs' claim to the arbitration of the City Surveyor under sect. 42 of the general conditions, which, as I have already said, is incorporated in the contract. [Refers to condition.] The City Surveyor is Mr. Henry Albert Cutler. It has been argued before us (*a*) that Mr. Cutler is a person so interested by his position as an employee of the defendants that in our discretion we should not send the matters in dispute to his arbitrament; (*b*) that Mr. Cutler has already so committed himself in his opinions as an adverse critic of the work and claims of the plaintiffs that he could not now arrive at an unprejudiced award which would be likely to be fair to them; and, thirdly, (*c*) that he would be a necessary witness on certain of the issues which the arbitrator would have to determine, and that as he could not be both arbitrator and witness, like a judge who in a similar case, as Mr. Justice Madden suggested, might have as a judge to return to the Bench to commit himself as an unsatisfactory witness, it would be impossible to refer the action to him.

I do not accede to any of these contentions. The parties agreed to the appointment of Mr. Cutler as sole arbitrator under the contract; and I do not elaborate the matter further, but merely say that it is governed by the decision of the Court of Appeal in *Ives & Barker* v. *Willans* (1) and the judgments therein. As to the second point, I have carefully read the voluminous correspondence, and I can find nothing in any part of it to suggest the contrary to what Mr. Cutler has sworn in pars. 8, 15, and 16 of his affidavit of 10th December, that, in spite of all he has done on behalf of the defendants during the performance of the contract, he is still perfectly unbiassed and competent to form an impartial opinion if the claims in this action are referred to him. I fully accept this statement made on oath by Mr. Cutler. Thirdly, I can find no issue arising under the contract in which Mr. Cutler would be a

(1) [1894] 2 Ch. 478.

necessary witness, so that the plaintiffs might have the benefit of his evidence on cross-examination. This at once differentiates the case of *Freeman* v. *Chester Rural District Council* (1) or *Bristol Corporation* v. *Aird* (2). I may say, in passing, that I think that, though the clause has been objected to generally on each or all of the foregoing grounds, it does not seem to me to be so unreasonable as suggested. The clause, from the necessities of the case, has become common in similar contracts. In *Ives and Barker* v. *Willans* (3) Kay L.J. refers to it as representing what he twice terms an inveterate practice or custom. I think that when a contractor during the performance of a contract is bringing in, for example, defective material, it is not altogether unreasonable that the other party, who ultimately has to pay for it, should have a decisive word from their surveyor, who is on the spot, as final arbiter.

He is there, and can at once decide, without involving unnecessary delay in the building operations, whether the material supplied, or the work being done, is up to the contract standard or not. This, in so far as it avoids delay, is in the interest of the contractor. Different considerations may arise in the case of disputes arising after the work has been completed, and I notice that this distinction was provided for in *Workman & Co.* v. *Belfast Harbour Commissioners* (4), where there was to be the award of the engineer for disputes during performance, and all differences subsequently in the settlement of the accounts were to be referred to the President for the time being of the Institution of Civil Engineers. If a similar course had been taken in the present case, it is possible that we should not have had to entertain the present application; but as the facts are, as they are, we can only apply the law. Apart from the undesirability, or from the possible disqualifications, of Mr. Cutler as final arbiter, let us examine the other grounds put forward in opposition to the motion.

I omit the reason that in our discretion we should refuse it, because it seems to me we should only exercise the discretion which we undoubtedly have where there is some legal ground for

(1) [1911] 1 K. B. 783.
(2) [1913] A. C. 241.
(3) [1894] 2 Ch. 478.
(4) [1899] 2 I. R. 234.

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doing so. We do not yet know whether, if this action is to be tried out, the final tribunal is to be a judge or a judge and jury. It may be either, and we cannot say that the case should go to an arbitrator, because it is eminently not one for a jury when we do not, and cannot yet, know whether the parties may agree to try it before a judge alone, who presumably would be quite as good as an arbitrator. Speaking, therefore, for myself, I do not propose to exercise any general discretion, but only one based on a legal objection brought forward and sustained. On this the argument divides itself into two heads. One is that important questions of law arising from the construction of the contract in connexion with subsequent events are involved, and the second is that a substantial amount of the claim does not arise under the contract at all (and it is only "rights or liabilities of either party hereunder or in anywise relating thereto" which can be referred under clause 42). As to the first I have only to satisfy myself that there is a real question of law going to the root of a substantial part of the claim, which it is inadvisable to have settled by the award of a borough surveyor as distinguished from the judgment of one of the King's Courts.

The question of law (on which I express no opinion) is this. The plaintiffs were by their contract obliged to complete the work in certain time instalments of completion, the last expiring within twelve months of the date of the contract. Did the contractors fail to comply with this condition, then, under clause 31 of the general conditions, they were liable for default at the rate of £1 per house per week so far as the default extended.

The corporation were bound "as soon as possible" to give the contractors the various sites on which the contractors were to build (clause 20, general conditions), but, as was pointed out in the correspondence, no date was fixed for such delivery. Delay in delivering the possession of the sites did take place as to some of them, and the final performance of the contract, as a matter of fact, did not take place till twelve months after the scheduled time. The plaintiffs urge that as they were bound to complete within twelve months by certain instalments of completion, there was an implied contract binding the corporation to give them possession of the sites within corresponding times.

It may be that the contract was that the corporation were entitled to bind the plaintiffs to perform the contract within time only if they did give possession within such time as would reasonably enable the plaintiffs to do so, and if they did not, then the penalties would not be imposable; or it may be that, disregarding the penalty clause, the corporation were only bound to deliver the sites within a reasonable time for themselves. What is a reasonable time is a jury question, by which I mean a question of fact, and if this should be the true construction, and if it means that ignoring the time limit as being only applicable to the state of affairs where the plaintiffs got possession in time to carry out the scheme in twelve months, and that the plaintiffs were bound to carry out the work if they got the sites in reasonable time, then if the actual delay in giving possession of the sites through the interposition of the military as deposed to, was reasonable, the plaintiffs have no cause of complaint for damages arising from such delay, which in reality is the major part of their present claim.

But it must be remembered that at this stage we are not construing the contract. That will necessarily have to be determined by some tribunal before there is either final award or judgment. We are only considering the nature of the claims in an action which it is proposed to refer. It is enough for the purposes of the present motion if it becomes evident that at some stage of the proceedings an important question of law will have to be determined. Assuming that the action proceeds, and speaking only for myself, I think this is essentially a case where it would be convenient to dispose of this question under Order 25, r. 2; but this is a matter for the parties. But that the corporation admit that there may be important questions of law to be determined is to my mind sufficiently clear from the 10th paragraph of Mr. Cutler's affidavit of December 10th, 1918, in which he says that if any question arises as to plaintiff's claims for increased cost, or in fact damages from delay owing to the war, during the arbitration he will be prepared to state a special case for the opinion of the Court. I am of opinion that if questions of law do arise involving the very gist of the action—and it is evident that they must—it would be absurd for us to send the matters in dispute to an

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arbitrator whose duty according to his undertaking in this affidavit would merely be to send the questions back to this Court on a special case for our decision. On this ground I am of opinion that the motion should be refused.

But I also base my judgment on a further ground. I take the analysis of the plaintiff's claim from the statement of Mr. Brown on behalf of the corporation. Part of the £14,506 12*s.* 3*d.* claimed is made up as follows:—Variations and additions, £5,000; damages for delay at £8 16*s.* 8*d.* per house, £2,200; increased cost of material, the increase being attributable to delay, £8,000; establishment charges and profits on the £8,000, £1,707.

Of the first item Mr. Wilson states £1,500 is a balance due for work done under the contract, but all the subsequent items are charged as damages, of which the nature and particulars are derived from the delay in completion of the contract brought about, if the plaintiff's case be true, by the conduct of the defendants.

The question therefore for our consideration is this: If there was either an implied agreement on the part of the corporation to give possession of the sites within such times as would enable the houses to be built on the twelve months time-table of the tender, or if there was an express condition to deliver possession of the sites within a reasonable time as a condition precedent to the execution of the contract, and if the corporation broke such condition, whether implied or expressed, is a claim for damages arising therefrom a difference under the contract which must be referred under clause 42 of the contract?

The words in clause 42 are certainly wide, but they were nearly as wide in the contract which was the subject-matter of the decision in *Lawson* v. *Wallasey Local Board* (1). That was a case stated. The plaintiffs had entered into a contract to do certain dredging works at the mouth of the Mersey. The work was to be performed under penalties. It could not be commenced until certain staging in the river had been removed by the defendants. The defendants made delay in the removal of the staging, and in consequence of their delay the plaintiffs were put to expense and damage. The clause in the contract analogous to Clause 42 in

(1) L. R. 11 Q. B. D. 229.

against the Board of Works for delaying the contractor in his proceedings is not within the contract deed. . . . We base our decision on this, that we are not satisfied that any part of the claims in this action are within the arbitration clause in the deed." The Wallasey decision does not appear to have been cited in this case; but there is the admission in argument referred to by the Judge between the then leaders of the Bar. This was in 1886.

The next case (in which Mr. Justice Kenny gave a considered judgment) was in 1899, *Workman* v. *Belfast Harbour Commissioners* (1). The motion was similar to the present. I do not set out the terms of the reference clause, simply holding that no reasonable distinction can be drawn between it and the provisions of clause 42 in the contract before us. The plaintiff claimed £49,285 9*s.* 6*d.* as extras over and above the contract price, and for damages for breach of "contract . . . and for defendants' wrongful obstruction of the plaintiff in the course of carrying out the contract." The defendants, on the other hand, counterclaimed for penalties.

The Court consisted of Kenny and Boyd JJ., and the judgment was delivered by Mr. Justice Kenny. At p. 246 he says: "The other questions are of a most serious character, and one of them at least, namely, that of delay in the execution of the work, with the consequent claims for damages on the one side and penalties on the other, is, in my judgment, outside this arbitration clause." He then refers with approval to *Lawson* v. *Wallasey Local Board* (2) and to *Moyers* v. *Soady* (3), which I have already referred to, and proceeds: "These cases warrant me in coming to the conclusion that these claims are not within the clause."

I certainly concur with Mr. Justice Kenny in his judgment in this case. The substantial claim here is for damages arising from breach of an implied, or it may be an express, contract, preliminary to the execution of the work contracted for, by which the completion of the works was delayed. The corporation may have a successful defence, owing to military requisitions, and I say nothing to prejudge that; but we are at present only dealing with claims, not defences, and I think there is no doubt but that

(1) [1899] 2 I. R., 234.
(2) 11 Q. B. D. 229.
(3) 18 L. R. Ir. 499.

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the claim for damages here, whether it can be hereafter sustained or not, is certainly made in good faith. On the grounds then that there is an important question of law arising on the construction of the contract, which it is more convenient should be disposed of in the action rather than by the award of an arbitrator, or by case stated in an arbitration; and, secondly, because, in my opinion, the weight of the action, in so far as it consists of a claim for damages for delay, is outside the reference clause, I think the motion should be refused with costs.

Solicitors for the plaintiffs: *White, M'Millan, & Wheeler.*
Solicitor for the defendant: *John M'Cormick.*

M. G. E.

NEWELL *v.* STARKIE.

H. L.
1919.
Feb. 20, 21.

Tort—Malicious abuse of authority—Conspiracy—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61).

In 1889 N. was appointed Inspector of National Schools at a progressive salary "on the usual conditions," and to hold the position "during the pleasure of the Commissioners." Having been reprimanded on several occasions, he was deprived of increments of salary, suspended, and finally compelled to resign on a diminished retiring allowance.

In an action brought by N. against S., the Resident Commissioner of National Education, claiming damages for maliciously procuring and conspiring with others to procure the infliction on the plaintiff of alleged wrongs, whereby his position and salary were prejudicially affected, and which finally resulted in his enforced retirement:

Held by the House of Lords (1), affirming the decision of the Court of Appeal and the King's Bench Division (2), refusing to set aside the judgment directed by Kenny J. to be entered for the defendant, that the Commissioners of National Education were a public authority, that their officers had duties to perform of a public nature, and that the Commissioners and their subordinates in an action for torts alleged to have been committed by them in carrying out their duties were entitled to rely upon the protection afforded by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 6).

Per Lord Finlay, the provisions of the Act as to (*a*) limitation, (*b*) solicitor and client costs, (*c*) tender of amends, and (*d*) failure of the plaintiff to give the defendant opportunity of tendering amends, are independent provisions; and the enactment with reference to costs as between solicitor and client applies in the case of any action which falls within the terms of the Act, whether it fails on the ground of time or on any other ground.

APPEAL by the plaintiff from an order of the Court of Appeal in Ireland, dated the 12th November, 1917, affirming the decision of the King's Bench Division (2) refusing to set aside the judgment directed by Kenny J. for the defendant, or to order a new trial of the action to be had.

Counsel for the appellant: *Healy K.C.* and *Dickie K.C.*
Counsel for the respondent: *Pigot K.C.* and *Maxwell K.C.*

Counsel for the respondent were not called on.

(1) Before LORD BIRKENHEAD C., and LORDS FINLAY, ATKINSON, and SHAW OF DUNFERMLINE.

(2) [1917] 2 I. R. 73, 83.

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THE LORD CHANCELLOR (1) dealt with the allegations contained in the appellant's case, and proceeded:—

My Lords, I have only to add this, that, in my opinion, there is no substance at all in the complaints that are made that Mr. Starkie usurped to himself the functions of the Board. There is not the slightest evidence that, from first to last, the Board did not approve and endorse everything that Mr. Starkie did. Indeed, the documents in the case, and the sanction ultimately given by the Board to that which Mr. Starkie had done, make it necessary to draw the inference that Mr. Starkie throughout was acting on behalf of, and with the approval of, the Board, and, therefore, my Lords, I am clearly of opinion that, upon all these points, the plaintiff failed to prove any such facts as would entitle him to place his claim before a jury and obtain their verdict.

My Lords, I have only to add an observation upon another branch of the defence, that which is based upon the Public Authorities Protection Act, 1893, sect. 1. The words of that Act, so far as they appear to me to apply to the facts of this case, may be read as follows:—"Where after the commencement of this Act any action . . . is commenced . . . against any person for any act done in pursuance . . . of any public duty . . . the following provisions shall have effect." And then it is provided that an action shall not lie if not commenced within six months. My Lords, I have to ask myself in this connexion whether these acts complained of in the conduct of the respondent were acts done in pursuance of any public duty or authority? My Lords, I answer this question, without the slightest hesitation, in the affirmative. I am most clearly of opinion that these were acts done in pursuance of a public duty.

Then it is contended by Mr. Healy, and also by Mr. Dickie, first, that the action under consideration here does not fall within the section which I have read because the acts are alleged to have been done maliciously. My Lords, it is, I think, sufficient commentary upon this contention to point out that if that circumstance were a valid answer to a defence based upon the Public Authorities

(1) The report of the judgments in the House of Lords has been printed from the shorthand notes of Messrs. W. B. Gurney & Son.

Protection Act, that Act could be reduced to a complete nullity by all plaintiffs who adopted the simple course of alleging malice in their statements of claim. It is evident that this cannot have been the intention of the Legislature. This contention, therefore, fails also.

But, thirdly, my Lords, it is contended—and this is the last contention I have to deal with—by Mr. Healy, that we must take the six months from the date of the continuance of the injury or damage, and he says that this is a continuing injury or damage, the effects of which are still unexhausted, and, therefore, the six months is not even now exhausted. The observation I have already made disposes of this contention, namely, that inasmuch as, in my opinion, there was no wrong, and no damage, there was no continuing wrong or damage.

On all these grounds, therefore, I am of opinion that this appeal must be dismissed with costs.

LORD FINLAY, having discussed the constitution of the Commissioners of National Education, and the power of the Board to delegate its authority to the Resident Commissioner, said:—

My Lords, on the whole, I entirely agree with the Lord Chancellor that there is nothing in the point that the defendant, the Resident Commissioner, had usurped duties which ought to have been left to the Board, and that there is no evidence which was fit to be left to the jury on the allegation that he had acted maliciously.

My Lords, I have only to add a very few words with reference to the Public Authorities Protection Act, 1893. The title of that Act is "Public Authorities Protection Act," but it is not the case that the operation of that Act is confined to actions against public authorities. The protection given by the Act applies to the case of any proceeding against any person "for any act done in pursuance or execution, or intended execution, of any Act of Parliament or of any public duty or authority," and so on. And, indeed, it is obvious that the Act would be futile if it did not apply to actions, say, against officials who had been employed in doing the act in respect of which the complaint arose.

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The second observation I have to make is that the Act necessarily will not apply if it is established that the defendant had abused his position for the purpose of acting maliciously. In that case he has not been acting within the terms of the statutory or other legal authority; he has not been bona fide endeavouring to carry it out. In such a state of facts he has abused his position for the purpose of doing a wrong, and the protection of this Act, of course, never could apply to such a case. But it cannot be maintained that the plaintiff, by alleging that the defendant had done something of that kind, could deprive the defendant of the right of pleading the Act, and showing that he had only acted honestly in the course of his duty, and of availing himself of the protection given by the Act.

The third observation I have to make is that the securities given by the Act to those who have acted in the discharge of public duties are fourfold, and are absolutely independent of one another. They are enumerated in the various heads (*a*), (*b*), (*c*), and (*d*) of the first section. The first (*a*) relates to time—the six months' limitation. Then (*b*) provides that wherever in any such action the defendant gets judgment in his favour he is to get costs, to be taxed as betwen solicitor and client. Then (*c*) relates to the right given to the defendant to make a tender; and (*d*) relates to the case where the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the action. These are independent provisions, and the enactment with reference to costs as between solicitor and client applies in the case of any action which falls within the terms of the Act, whether it fails on the ground of time, or on any other ground.

My Lords, under these circumstances it appears to me that the Act applies, that there would also be the defence of limitation if the cause of action itself had been established, and the only importance of the Act, as was pointed out in the Court below, is in its effect on the scale on which costs should be taxed.

My Lords, I agree that this appeal should be dismissed with costs.

LORD ATKINSON concurred, and said:—

I quite concur with my noble and learned friend who has preceded me on this question about the Public Authorities Protection Act. It is perfectly true that a public official acting in the exercise of a statutory or other authority cannot be protected under that Act if he acts maliciously. He may, however, be protected if he acts mistakenly, but honestly, in the bona fide belief that he is carrying out the powers which he fancies himself endowed with; but it is impossible to presume malice from the fact that he is mistaken, and this argument is conducted as if it were only necessary to prove that Mr. Starkie had not got the authority and the power which he thought he had, and because he thought it, although he bona fide thought it, and intended to exercise it, that is proof of malice if he had not got it in fact. My Lords, that is not the law, and it is not sense. A man is entitled to protection if he bona fide considers that he is carrying out the authority conferred upon him.

My Lords, I do not think it is necessary for me to add anything more to what has been said already. I adopt, if I may, the judgment of Lord Justice Molony in the Court of Appeal in Ireland. I think it is most able and accurate, and I wish to adopt it, if I may, as my own. I am, therefore, of opinion that there was no evidence proper to submit to a jury, that is to say, that there was no evidence upon which a reasonable man could find in favour of the plaintiff's claim; and if that be so, as I think it is, it was the duty of the learned Judge to direct in favour of the defendant, and I think he has discharged that duty properly, soundly, and well.

LORD SHAW OF DUNFERMLINE, in the course of his judgment, said:—

My Lords, some comment has been made, I am aware, in certain decisions with reference to the Public Authorities Protection Act, but this action is a very excellent illustration of the value of that statute. That statute, as your Lordships well know, was passed with the main object of securing that local and even Treasury Budgets should have some approach to finality, and that it would not do with reference to public authorities, who have to

H. L. 1919.

NEWELL v. STARKIE.

Lord Shaw of Dunfermline.

budget from year to year, to permit large claims to lie over, so that the ratepayers of one generation might have to pay the liabilities of another. The Public Authorities Protection Act closed up such accounts after a period of six months.

No explanation, my Lords, has been offered in this case why this action, if there was ground for it at all, was not timeously brought. In my humble judgment, the Public Authorities Protection Act does apply; it eclipses all right on the part of a person in the plaintiff's position, and that is an end of the case. But, my Lords, unhappily I have to make the following further observations in view of the argument which has been presented at your Lordships' Bar.

In the first place, my Lords, I desire to say, and to make it as clear as I can, that I think the relations between the Commissioners of Education and the Inspectors of Schools in Ireland are relations which are within the sphere, not of private contract, but of public duty. My Lords, it would be a bad day for Ireland, or for any of these countries, if it were ever possible for an inspector of schools to remove from the ambit, not only of public duty, but of constant and steady watchful administration of the Commissioners, the supervision by them of his conduct in the course of his official work. Therefore, my Lords, being in the region of public duty (I hope I am not disrespectful to the learned counsel who did present the argument), the citation as a precedent to your Lordships was misplaced—the citation of *Bradford Corporation* v. *Myers* (1), which was a case of private contract and nothing else.

The second observation I have to make is that, being a case in reference to the discharge of public duty, it is a serious burden which the plaintiff assumes when a charge is made of the character such as the present action discloses. My Lords, the plaintiff has selected as the victim of this attack one member of the Board of Commissioners in Ireland. That member happens to be the one paid member; he is called the Resident Commissioner. I think it only right to say that, having perused the whole of the correspondence, evidence, and documents, I see no ground whatsoever for attacking either the honour or the judiciousness of the Resident Commissioner.

(1) [1916] 1 A. C. 242.

My Lords, the grounds of this action can only be, first, that he had usurped in his own person functions of the Board, and having so usurped these functions, in the second place he maliciously exercised them. In support of this very grave allegation, the plaintiff, upon whom the onus of establishing it rests, examines as witnesses himself and himself alone; and he produces letters which have come by the goodness of the Board of Education into this case. Not one of those letters is made the subject of examination; they do not prove their own contents. But I desire further to say that if they did prove their contents, they would not justify either of these allegations, namely, usurpation of the functions of the Board or malicious exercise of those functions.

My Lords, I am satisfied that the proper course was pursued in the Courts below.

Questions put:

That the order appealed from be reversed.

The Non-Contents have it.

That the order appealed from be affirmed, and this appeal dismissed with costs.

The Contents have it.

Solicitor for the appellant: *Herbert Z. Deane*, for *Sainsbury & Co.*

Solicitors for the respondent: *Morten, Cutler, & Co.*, for *John M. Maxwell.*

K. B. Div. 1918. Nov. 20, 21.

JAMES MARTIN, PLAINTIFF, *v.* MARY WATSON, EDWARD EGAN, AND MARY EGAN, DEFENDANTS.

War—Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (*5 & 6 Geo. 5, c. 97*)—*Mortgagee's action of ejectment—"Enforcing security"—Letting by mortgagor void against mortgagee—"Deriving title under mortgagor."*

A, the owner of a leasehold house, assigned it by way of mortgage: the interest of the mortgagee became vested in the plaintiff. A subsequently assigned his interest in the premises to B, who made a letting to C, which was void against the mortgagee. The plaintiff brought an action of ejectment on the title against A, B, and C.

Held, 1. That in bringing the action the plaintiff had taken a step for enforcing his security within the meaning of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), sect. 1, sub-s. 4. 2. That C was a person deriving title under the mortgagor within the meaning of sect. 2, sub-s. 1 (*d*), of that Act.

MOTION that judgment entered for the defendant Mary Egan, by Ronan L.J., on 29th July, 1918, be set aside, and that judgment be entered for the plaintiff, or, alternatively, for a new trial of the action.

The action was an action of ejectment on the title brought by a mortgagee; it was tried by Ronan L.J., without a jury. The facts were as follows:—By indenture, dated 8th June, 1878, the defendant Edward Egan assigned to the National Bank, Ltd., by way of mortgage, certain leasehold premises, to which he was entitled; Edward Egan's interest subsequently became vested in the defendant Mary Watson. By indenture, dated 10th September, 1915, the mortgage debt and the premises were assigned to the plaintiff. By agreement, dated 25th August, 1916, the defendant Mary Watson demised the premises to the defendant Mary Egan, as yearly tenant; the plaintiff never assented to or adopted this letting. The defendant Mary Watson had brought an action in the County Court to set aside the agreement of 25th August, 1916, which was settled; she had requested

the plaintiff to bring the action of ejectment, and had signed a consent for judgment; no appearance was entered on behalf of the defendant Edward Egan. All interest due on the mortgage debt had been paid; all the covenants by the mortgagor had been performed; and the property was in a proper state of repair.

The learned Judge held that the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), sect. 1, sub-s. 4, was a valid defence to the action, and gave judgment for the defendant Mary Egan.

Price K.C. (with him *MacCormack*), for the plaintiff:—

The Act does not forbid a mortgagee to take possession. Under sect. 1, sub-s. 3, tenants are protected against ejectment, but there is no corresponding protection given to mortgagors by sub-s. 4. An action of ejectment is not a step for enforcing the mortgagee's security. They referred to *Welby* v. *Parker* (1); *Holt* v. *A. E. G. Electric Co., Ltd.* (2); *National Bank, Ltd.*, v. *Claffey* (3).

"Deriving title" means "deriving good title"; the letting to Mary Egan was void: *Keech* v. *Hall* (4); *Gibbs* v. *Cruickshank* (5); she may be entitled to redeem, but that does not involve that she is a person "deriving title" from the mortgagor: Conveyancing Act, 1881, sect. 2, sub-s. 6, defines mortgagor as including persons deriving title from the original mortgagor, or entitled to redeem.

Webb, for the defendant Mary Egan:—

"Security" in sect. 1, sub-s. 4, means the rights which the mortgage gives the mortgagee, of which the right to possession is one. Ejectment is a step for recovering the principal money, because, after payment of the interest, the rents and profits are applied to payment of principal. The letting is good as between mortgagor and tenant, and the tenant is entitled to redeem: *Tarn* v. *Turner* (6). The meaning of the sub-section is that mortgagors who pay interest, and repair the mortgaged premises, shall not be disturbed.

(1) [1916] 2 Ch. 1.
(2) [1918] 1 Ch. 320.
(3) [1917] 2 I. R. 281.
(4) 1 Smith L. C. 577.
(5) L. R. 8 C. P. 454.
(6) 39 Ch. D. 456.

K. B. Div. 1918.

MARTIN v. WATSON & EGAN.

DODD J.:—

There are two questions in this case—the first question is whether the plaintiff in bringing this action has taken a step for enforcing his security. In my opinion he has. The action could only be brought under the mortgage, and in exercise of rights given by it. The words of sect. 1, sub-s. 4, "keeps the property in a proper state of repair," point to possession by the mortg ger. The whole statute looks to occupiers of houses, and is intended to protect them in the enjoyment of that occupation.

The second question is whether the defendant Mary Egan is a person deriving title under the original mortgagor. She acquired some interest in the premises under the lease to her; that is the ground of the decision in *Tarn* v. *Turner* (1), and to that extent she derived title under the mortgagor. In my opinion the defendant has a good defence under the statute.

GORDON J.:—

The mortgagee had no right except what the mortgage gave him; and when he went to Court he went under the powers he got under the mortgage. I cannot see how it can be suggested that bringing such an action is not "taking a step for enforcing his security." As to the second point, a lease of the entire premises is of the same character and of the same effect as an assignment. The lessee acquired some interest in the subject-matter of the mortgage, and to that extent derives title under the mortgagor.

Solicitor for the plaintiff: *P. J. Hannan.*

Solicitor for the defendant Mary Egan: *D. MacDermot.*

M. G. E.

(1) 39 Ch. D. 456.

GEORGE FORSYTHE, APPELLANT; GEORGE ROSS, RESPONDENT (1).

K. B. Div. 1919.

Feb. 24, 25. May 12.

Gaming and wagering—Unlawful gaming—Automatic machine—Game of skill—Chances not alike equal to all players—Personality of players—Children—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 2—*Gaming Houses Act*, 1854 (17 & 18 *Vict. c.* 38), *s.* 4.

The appellant was convicted under the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), of using his premises for the purpose of unlawful gaming being carried on therein. Proof was given of the user on the appellant's premises of an automatic gaming machine so constructed that a person might by practice attain such dexterity in manipulating it that his skill might make his chances even with or superior to the chances in favour of the machine. When the persons resorting to the premises where such a machine was kept acquired such skill, it was removed elsewhere. The machine was used for gaming by children of tender years not possessing skill in manipulating it.

Held, that the question whether the chances of a game are "alike favourable to all the players," under the Gaming Act, 1845, sect. 2, does not depend on the abstract character of the game irrespective of the personality and capacity of the players and the conditions of the game, and that the defendant was properly convicted.

CASE STATED under 20 & 21 Vict. c. 43.

The facts appear sufficiently from the judgment.

D. M. Wilson K.C., *T. W. Brown K.C.*, and *Reid*, for the appellant:—

The justices have found that the game is a game of skill; there is no evidence that the children who used the machine could not acquire skill in using it. If a game is a game of skill, it is not "an unlawful game": *Jenks* v. *Turpin* (1). A game of skill does not become a game of chance because the players are unskilled; the "chances" are the chances of the game itself. In a game of skill the question of equal chances cannot arise. In *Donaghy* v. *Walsh* (2) the decision was based on the finding of fact that the game was a game of chance. [They also referred to

(1) Before MOLONY C.J., GIBSON, KENNY, and DODD JJ.

(1) 13 Q. B. D., at p. 524. (2) [1914] 2 I. R. 261.

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FORSYTHE v. ROSS.

Pessers v. *Catt* (1); *di Carlo* v. *M'Intyre* (2); *Mackintosh* v. *Granata* (3); *Forte* v. *M'Alister* (4).]

Best K.C., and *Cooper*, for the respondent:—

"Gaming" is "playing at any game for money or money's worth": *The Queen* v. *Ashton* (5); *Craig* v. *Boyan* (6); *Bew* v. *Harston* (7). Gaming is "unlawful," under the Gaming Act, 1845, sect. 2, if the chances are not alike favourable to all the players: *Jenks* v. *Turpin* (8); *Fielding* v. *Turner* (9). The case is covered by the decision in *Donaghy* v. *Walsh* (10).

The judgment of the Court was delivered by MOLONY C.J.:—

The defendant was summoned under the provisions of sect. 4 of the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), for that he on the 26th day of October, 1917, being the occupier of the house No. 92 Agnes Street, in the city of Belfast, did use the same for the purpose of unlawful gaming being carried on therein, contrary to the statute.

It appears from the evidence that the defendant had in his shop on the day in question a "clown" automatic machine which was similar in every material respect to the machine described in *Forte* v. *M'Alister* (4).

As a result of the evidence the magistrates found:—(*a*) That a person by practice might attain to such a degree of dexterity in manipulating the machine that his skill might make his chances even with or superior to the chances in favour of the machine. (*b*). That when this occurs the machine is removed to some locality where the inexperience of the players makes its chances to be still for a time in the ascendant. (*c*) That young persons of the class seen playing do not possess at once the dexterity referred to. (*d*) That consequently in the use of the machine the chances are predominantly in favour of the keeper of the machine.

There is no doubt there was ample evidence to support the findings of the magistrates, and the only question we have to determine is as to whether the findings are sufficient to sustain the conviction.

(1) 77 J. P. 429.
(2) [1914] S. C. J. 60.
(3) 53 Scots L. R. 766.
(4) [1917] 2 I. R. 387.
(5) 1 Ell. & Bl. 286.
(6) [1901] 2 I. R. 429.
(7) 3 Q. B. D. 454.
(8) 13 Q. B. D., at p. 530.
(9) [1903] 1 K. B. 867.
(10) [1914] 2 I. R. 261.

It is clear that the section applies to any game where the chances "are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet": Gaming Act, 1845, sect. 2 (8 & 9 Vict. c. 109); *Fielding* v. *Turner* (1); and *Donaghy* v. *Walsh* (2).

The question is whether the game as played on the defendant's premises on the 26th October, 1917, comes within the definition. As played upon that occasion the chances were not alike favourable to all the players; and, indeed, it appears from the evidence of Sergeant M'Donnell that the players were all children of tender years, described by him as being between eight and eleven years old, and that out of twelve occasions upon which he saw the game played the players lost eleven times.

It was argued that equality of chances must be determined by the abstract character of the game, irrespective of the personality and capacity of the players and conditions of the game. In every game of skill (it is urged) the more skilful will defeat the less skilful player. We cannot accept such an argument as applicable here. The automaton player (the machine) was matched against children of tender years, who, in most cases, as defendant knew beforehand, would lose, and who, if they might by practice acquire sufficient skill to win (which I should doubt), were prevented from getting that advantage by the machine being removed to another place. As against the young, thoughtless, and inexperienced children, allured and tempted to play, the chances were intended and contrived to predominate in favour of the automaton, and to yield a steady source of profit. The game was no more one of skill with them than it would be with an intoxicated man attempting to play. Considering the players and conditions, the game was unfair; and we think that upon the findings of the magistrates the defendant was properly convicted. I may add that our judgment does not depend on plurality of players or occasions. A single use of the machine by one player may constitute unlawful gaming, and be punishable as such.

Solicitor for the appellant: *John Graham.*

Solicitor for the respondent: *Henry A. Wynne.*

M. G. E.

(1) [1903] 1 K. B. 867.

(2) [1914] 2 I. R. 261.

K. B. Div.
1919.
April 28.

ELLEN FLANNERY *v.* PATRICK PAUL RYAN (1).

(1919. No. 1296.)

Practice—Equitable execution—Receiver—Motion Ex parte.

Application for the appointment of a Receiver by way of equitable execution should be by motions ex parte, and not on notice, except in pension cases.

Campbell v. *Usher* (2) distinguished.

MOTION ON NOTICE.

Corbett, on behalf of the plaintiff, applied for an order for the appointment of a Receiver by way of equitable execution over defendant's distributive share as one of the next-of-kin of Thomas Ryan, deceased.

[KENNY J.—Why have you served notice of motion? Should not the application be made ex parte?]

Corbett.—The practice has been changed. The Court of Appeal has so held: *Campbell* v. *Usher* (2).

[KENNY J.—That was a pension case. It is the practice to require notice in pension cases, but not in a case like the present.]

Corbett.—There is nothing in the report in *Campbell* v. *Usher* (2) to show that the decision was limited in any way. It has been acted on since 1913 by different Judges in this Court. The notice of motion has been served personally on the defendant, and he does not appear to oppose it. The affidavit contains the necessary averments.

KENNY J.:—

We will make the order, but only allow costs of an ex parte motion. I have no doubt that the new practice was only in reference to pension cases.

Solicitor for the plaintiff: *James O'Brien.*

J. B. B.

(1) Before KENNY and MOORE JJ. (2) 47 I. L. T. R. 165.

MARGARET O'REGAN *v.* ROBERT WHITE AND HANORA WHITE (1).

(1917. No. 9970).

K. B. Div. 1918.
May 31.
June 7.

Appeal. 1918.
Nov. 22, 25.
Dec. 5.

1919.
Feb. 11.

Landlord and tenant—Judicial tenancy—Sub-division under verbal agreement—No consent by landlord—Possession—Part performance—Enforceable contract—Land Law (Ireland) Act, 1881, *sect.* 5, *sub-s.* 3—*Purchase of Land (Ireland) Act*, 1885, *sect.* 8—*Purchase by tenant—Real Property Limitation Act*, 1833 (3 & 4 *Wm.* 4, *c.* 27), *sect.* 3.

In December, 1902, A, the occupier of a holding held under a judicial tenancy, by a verbal agreement, to which neither then nor subsequently was the landlord's consent obtained, gave B, one of the defendants, a plot of ground forming part of the holding for the entire of A's estate and interest therein. In April, 1903, B entered into possession of the plot, built a shop together with out-offices upon it, and remained in continuous possession, without paying any rent, down to the commencement of the action in December, 1917. In 1906 A entered into an agreement with his landlord to purchase the holding under the Land Purchase (Ireland) Acts; and on February 25th, 1915, the holding was by fiat of the Land Commission vested in A's successor in title. In December, 1917, the plaintiff, as successor of A, issued a writ against the defendants for recovery of possession of the premises. The jury found that the plaintiff's predecessor had promised to give the plot of ground absolutely to the defendants. Upon the finding of the jury judgment was at the trial entered for the defendants.

Held, by the King's Bench Division (Gibson, Dodd, and Moore JJ.), that subdivision being illegal under sect. 5, sub-s. 3, of the Land Law (Ireland) Act, 1881, there was no enforceable contract, and that the defendants had not acquired a title under the Statute of Limitations.

Held, by the Court of Appeal, reversing the King's Bench Division (Sir James H. Campbell C. dissenting), that the contract was lawful, and was, in its nature, capable of being specifically enforced against the plaintiff.

Held (affirming the King's Bench Division), that no title to the fee had been acquired by the defendants under the Statute of Limitations, as they had not been twelve years in possession when the fee simple was vested.

The plaintiff's claim was, as administratrix of Timothy O'Regan, deceased, to recover possession of a house and shop and a plot of ground attached thereto at Ballyfoliah, barony of west division of East Carbery, County of Cork. The statement of

(1) In the Court of Appeal before SIR JAMES H. CAMPBELL C. and RONAN and O'CONNOR L.JJ.

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claim set out that Peter O'Regan held a farm containing 53 acres at Ballyfoliah as a judicial tenant; that in the year 1906 he made a letting to the defendant, Robert White, of a disused creamery and a house known as "the shop" on the holding from March 1st, 1906, as a yearly tenancy at the annual rent of £4; that on March 1st, 1906, Peter O'Regan entered into an agreement with his landlord to purchase the holding under the Land Purchase (Ireland) Acts. On the occasion of the marriage of his son, Timothy O'Regan, to the plaintiff, Peter O'Regan by deed dated October 16th, 1909, assigned to Timothy O'Regan his estate and interest in the holding and the benefit of the purchase agreement, reserving unto himself and his wife during their joint lives and the life of the survivor of them the aforesaid creamery and shop. Timothy O'Regan forthwith entered into possession of the holding, and by fiat of the Irish Land Commission, dated February 25th, 1915, the holding, including the creamery and shop, was duly vested in him in fee simple, and he was thereupon registered as the owner thereof in fee simple pursuant to the Local Registration of Title (Ireland) Act, 1891. Timothy O'Regan died intestate on February 16th, 1916, Peter O'Regan died on April 16th, 1916, and Mary O'Regan, his widow, died on May 1st, 1916. On April 12th, 1916, letters of administration to the estate of Timothy O'Regan were granted to Margaret O'Regan, the plaintiff. In October, 1902, the defendant, Robert White, married the defendant Hanora O'Regan, daughter of Peter O'Regan. Some years ago, the defendants entered into possession of a small plot of ground about one quarter of an acre in area adjoining the disused creamery and shop, and forming part of Peter O'Regan's holding. On July 18th, 1916, and August 28th, 1916, notice of the terms of the aforementioned deed of assignment was given to the defendants, and the plaintiff demanded possession of the creamery, shop, and plot. The defendants refused to give up possession; notice to quit was then served, and on October 17th, 1917, the defendants handed over possession of the creamery to the plaintiff, but refused to give up possession of the shop and plot.

The defendants denied that the letting of 1906 included the shop and plot, or that they held them under any tenancy. They pleaded that Robert White got no fortune with his wife; that in

1902 Peter O'Regan proposed to him that he should give up his position as manager of the Donoughmore Creamery, come to live with Peter O'Regan at Ballyfoliah, and act as manager of the creamery there, "the said Peter O'Regan offering as part of said proposal to give him by way of gift for the entire of his own estate and interest therein in lieu of marriage fortune a plot of ground parcel of the said Peter O'Regan's holding . . . whereon to build a shop and out-offices and establish a business." The defendant, Robert White, accepted that proposal, entered into possession of the plot of ground, and on the faith of the gift of the plot laid out considerable sums of money in building a shop and out-offices and establishing a successful business in the shop and premises. The defendants relied upon these circumstances as an equitable defence to the plaintiff's claim for recovery of the plot and shop. As an alternative defence they said that for upwards of twelve years before the commencement of the action—the writ was issued on December 6th, 1917—they were in continuous possession of the plot of ground and shop as beneficial owners thereof, and not under any contract of tenancy. Neither during said period nor at any time did they ever pay rent in respect of the plot or house. The defendants also pleaded that the plaintiff's right, if any, was barred by the Real Property Limitation Act, 1874, and his right and title to the plot and house extinguished by virtue of that Act and 3 & 4 Wm. 4, c. 27.

In reply, the plaintiff pleaded that the landlord's consent in writing was not given as required by sect. 5, sub-s. 3, of the Land Law (Ireland) Act, 1881, to the agreement of gift relied upon by the defendants.

The action was tried before Gordon J. and a common jury of the City of Cork on March 26th, 1918. From the judge's report it appeared that the plaintiff obtained a decree in the County Court in April, 1917, for the recovery of "a dwelling-house, out-offices, and shop, with the plot of ground attached and the appurtenances," and that upon appeal Pim J., at the Summer Assizes, 1917, varied the decree by striking out the words "shop with the plot of ground attached and the appurtenances." Peter O'Regan had, in his lifetime, brought a process in the County Court for trespass against the Whites, and obtained a decree

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which, on appeal, was reversed and changed into a dismiss without prejudice. Margaret O'Regan, the plaintiff, swore that at her marriage negotiation Peter O'Regan stated that White had the creamery and shop for his (Peter's) and his wife's life at £4 a year.

Robert White, the defendant, stated that in 1902 "old Peter said if I got liberty from my employers and came back to manage the creamery, I could build a shop, and he would go half in it, and I could have it for my life and my wife's. I was to be the owner, to have it for my property, and never to be disturbed out of it." There was no agreement in writing. Mrs. White's evidence was to the effect that her father sent for them, and said he would put up the shop for them, "he to pay and we to pay, and we were to own it." They had been in possession since the shop was finished, before April, 1903.

The questions put by the learned Judge to the jury and the answers thereto were as follows:—1. In the year 1902 did Peter O'Regan promise defendant, Robert White, that if he came back and managed the creamery he would give him the plot of ground absolutely, and assist him in building a shop upon it? Answer, "Yes." 2. Did defendant in 1902 return and manage Peter O'Regan's creamery? Answer, "Yes." 3. Did Peter O'Regan put defendant into possession of the plot. Answer, "Yes." 4. Did defendant enter into possession of the plot, and on the faith of the said promise expend money in building the shop and reclaiming the plot? Answer, "Yes." 5. Have the defendants been in continuous possession and occupation of the plot since 1903? Answer, "Yes." 6. Did the letting by Peter O'Regan in 1906 include the shop and plot of ground or either of them, and if so, which? Answer, "No."

Upon these findings the learned Judge gave judgment for the defendants, with costs.

The plaintiff moved in the King's Bench Division that the judgment for the defendants be set aside, and that judgment be entered for her.

Serjeant M'Sweeny and *H. J. Moloney*, for the plaintiff.

Serjeant Sullivan, *H. D. Conner K.C.*, and *J. F. Bourke*, for the defendants.

The arguments were similar to those in the Court of Appeal.

GIBSON J.:—

Having heard this case, we are all agreed about it. In England it could have had only one result; the defendant would have an equitable estate, which would be an answer to an ejectment. But the property was a holding coming within the Irish Land Acts, under the provisions of which it is impossible to sub-let or subdivide without the landlord's consent. In the present case the subdivision was not followed by any consent on the part of the landlord. When the estate was being sold, the lands were represented as being in possession of the purchasing tenant. The subdivision was illegal. But the defendant was lawfully in occupation. He was a tenant-at-will. His possession was not trespassory but lawful; it was a possession which at any moment could have been determined by a demand of possession. At any period the plaintiff could have dispossessed the defendant. If twelve years had elapsed, there would have been a clear title against the owner dispossessed. Starting with 1906, when the possession of the defendant became complete, the premises were the subject of an unlawful contract. His case was that he was to have the fee simple. Now, what was the position of affairs when the plaintiff or the plaintiff's predecessor acquired the property under a purchase agreement subsequently carried out by a vesting order in 1915? Sergeant Sullivan and Mr. Bourke in his short and excellent argument contended that though the contract was unenforceable, it had a value in equity; there was nothing to prevent the landlord validating the subdivision. The landlord never did so in fact, and the only inference we can draw is that the landlord was never told about the subletting. The estate was sold on the basis of there being no subdivision. I have no doubt whatever that a tenant who takes upon himself to sell in anticipation of the landlord's consent being obtained, cannot justify a refusal to carry out his contract, to which it may be tolerably probable the landlord will give his consent, on the ground that the landlord may not give his consent. In the case before the Vice-Chancellor (*Leitch* v. *Simpson*) (1), it must have been in contemplation that the landlord would probably give his consent. But supposing when the time for specific performance came, the landlord had affirmatively refused to give his consent,

(1) I. R. 5 Eq. 613.

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Gibson J.

the Vice-Chancellor would have dismissed the suit with costs. Specific performance of an unlawful contract would be impossible. The argument of Serjeant Sullivan is as follows:—He says that during the period after the alleged possession was taken, the landlord might have given his consent, and we ought to suppose this contract was valid till it was seen what course the landlord would take, and it must be assumed the plaintiff is now consenting to the subdivision. I think the true view of the case is that these parties deliberately subdivided the holding without any legal right, contrary to the statute. There was no intention of validating their act by a subsequent consent of the landlord, supposing a subsequent consent to be sufficient, as under Deasy's Act. Can we consider this as a living effective contract, having regard to the provisions of the Act of 1881?

What is the effect of the landlord having sold his estate, and the estate being vested in the tenant? Is the purchaser obliged to perform a contract not binding on him? If this case had been in England, the purchaser would have purchased the estate with a duty to perform his own contract. The landlord could at any time have ratified the subletting. Can it be said that because the purchaser has taken the landlord's estate, he must necessarily be taken as consenting? If he had told the subtenant he meant to hold by his bargain, that might have been a perfectly good contract, for it was not malum in se. No doubt *Donoughmore* v. *Forest* (1) laid it down that such a tenancy is illegal and not merely void, but I do not think it is malum at all, though it is prohibitum. I think that if the purchaser had adopted the existing contract, the defendants would have been all right, apart from the registration question. That is Mr. Bourke's proposition. But there is no finding that there was any ratification. There is nothing like a new contract to validate the old void agreement. Serjeant M'Sweeny relies on the fact that the claim of the defendants is not registered, and cannot be registered. This objection is, I think, well founded.

An additional argument has been advanced by Mr. Moloney not unworthy of consideration, which we need not now decide. He says the plaintiff obtained a new virgin estate from the landlord, even though his original tenant's interest was in part

(1) I. R. 5 C. L, 443.

bad by reason of adverse possession. He got (he urges) the whole original tenant-occupier's estate, and not merely so much of the estate as was not taken out of the tenant by any dispossession. The estate conveyed and registered represents the entire occupying tenant's interest. When that estate is vested in the plaintiff, how is it to be taken out of her by any supposed dispossession? It is a new estate, a clear unincumbered estate. Here the possession was possession under a tenancy at will. It began in 1903. It is not on the register. Serjeant Sullivan argues that when the tortious possession commences before the first registration, it may be the foundation of a title to rectify the register. He appears to think jurisdiction to rectify the register may now be given to this Court by the verdict of the jury. But it is plain from the terms of the statute that the Legislature contemplated the judge and not a jury as the rectifying authority. This Court cannot be turned into a ministerial rectifying authority controlled by a jury's view of the facts. It would be different where a judge is disposing of a case, and where he thinks that a conclusive case is made for rectification of the register. But no such case is made before us, and the jury have not found any verdict which makes it necessary to make any change. Verdict must be entered for the plaintiff with costs of the trial.

DODD J.:—

I am of opinion that there was no contract, that there was no equity capable of being enforced, and that the defendants had not acquired a title under the statute. I think the learned Judge, having read the findings of the jury, should have entered a verdict for the plaintiff. I concur.

MOORE J.:—

I have had the advantage of discussing the matter with my colleagues. I quite agree that there would have been a good equity in England to enforce specific performance of the contract; but the whole thing depends on whether such a contract is enforceable in Ireland. Owing to Irish land legislation, it cannot be here enforced, and there is a long line of authorities, from *Gillman* v. *Murphy* (1), to this effect. I also concur in the point about the Statute of Limitations.

(1) I. R. 6 C. L. 34.

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The defendants appealed (1).

Serjeant Sullivan and *H. D. Conner K.C.* (with them *J. F. Bourke*), for the appellants:—

An agreement to subdivide a holding is not necessarily illegal or invalid under sect. 5, sub-s. 3, of the Land Law (Ireland) Act, 1881. An equitable assignment is not sufficient to operate as a breach of a covenant not to assign without the consent in writing of the lessor: *Gentle* v. *Faulkner* (2). The jury have in effect found that there was an executory contract by Peter O'Regan to grant the fee simple of the plot to the defendants; and when he or his successor in title obtained the fee under the land purchase agreement, he was, on the principle of *O'Connor* v. *Foley* (3), bound to complete his contract. A vesting order obtained by a purchaser under the Land Purchase Acts cannot be relied upon inequitably by him for the purpose of defeating his own contract or grant: *Reddock* v. *Wright* (4). *Moynehan* v. *Hickey* (5) is on the facts of this case a conclusive authority. The net decision in that case was that as soon as a party in a transaction like this was, owing to the acquisition by him of the fee simple, in a position to give the necessary consent, he was estopped from denying the rights of the defendants to the benefit of their contract. Peter O'Regan, who had become the owner when he purchased the holding under the Land Purchase Acts, had in advance sanctioned the subdivision and the granting of the fee simple in the plot to the appellants.

If after the plaintiff or his predecessors had acquired the power of the landlord they had disturbed the appellants, the latter would have had a right to damages for revocation of the licence: *Hurst* v. *Picture Theatres, Ltd.* (6). How have the appellants lost their right to specific performance of the agreement? Letting the appellants here into possession was part performance. The general law in regard to specific performance is stated in Fry, 4th edition,

(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

(2) [1900] 2 Q. B. 267.
(3) [1906] 1 I. R. 20.
(4) 28 I. L. T. R. 148.
(5) 10 I. L. T. R. 98.
(6) [1915] 1 K. B. 1.

page 430, in the following terms:—"It is not necessary to the specific performance of a contract that it should be one which the parties at the time of entering into it had the power of carrying into effect, nor one with regard to which it depends on themselves alone whether they would ever be able to perform it. For where a party enters into a contract without, at the time, having the power of performing it, and afterwards acquires that power, he is bound to perform the contract he entered into." To a suit for specific performance by the purchaser against the vendor of a leasehold interest it is not a defence that the lease contains a covenant against alienation without the consent of the landlord, and that it does not appear that the consent of the landlord has been obtained: *Leitch* v. *Simpson* (1).

Even though the agreement be unenforceable, the appellants have acquired a good title under the Statute of Limitations. Sect. 52 of the Local Registration of Title (Ireland) Act, 1891, inferentially shows that a claim under the Statute of Limitations running at the time of registration is not affected by the Act, but remains as a right against the interest of the purchaser or registered owner. [They referred to *Asher* v. *Whitlock* (2), and *Perry* v. *Clissold* (3).] The fact of the tenant acquiring the fee does not prevent an incipient title under the statute from being a recognizable interest. Under sect. 8 of the Purchase of Land (Ireland) Act, 1885, the fee simple vested in the purchaser of a holding, who had been the tenant, is deemed to be a graft upon the previous interest of the tenant in the holding and subject to any rights arising therefrom. The note on the register in the present case is to the same effect. Therefore the acquisition of the fee by the plaintiff created no new starting-point for the Statute of Limitations. The defendants were more than twelve years in possession before the action was commenced; and, even assuming the agreement to be unlawful and void, there is a clear defence under the Statute of Limitations.

(1) I. R. 5 Eq. 613. (2) L. R. 1 Q. B. 1. (3) [1907] A. C. 73.

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Serjeant M'Sweeny and *H. J. Moloney*, for the respondent :—

The arrangement between Peter O'Regan and the defendants, whether it amounted to a subdivision on the spot as a finished transaction, or a subdivision to be completed subsequently, was unlawful and void ; and no equity can arise from an arrangement of that kind. As to the argument based upon estoppel, we submit that there can be no estoppel founded upon an illegality. It is quite clear from *Fogarty* v. *Shanahan* (1) that the subdivision or attempted subdivision of a holding, since the passing of the Land Law (Ireland) Act, 1881, without the landlord's consent is null and void to all intents and purposes. See also *O'Kane* v. *Burns* (2) ; *Canavan* v. *Burton* (3) ; *Riddall* v. *Mullan* (4). In the last case, FitzGibbon L.J., at p. 423, says : " *Fogarty* v. *Shanahan* (5) is the unanimous decision of the Queen's Bench and of this Court that a subletting of a statutory holding is 'prohibited by statute,' 'unlawful,' 'illegal,' and 'absolutely void.' Unless the Act of 1896 has since provided otherwise, such subletting can convey no estate, can create no tenancy, can transfer no interest, cannot change the possession, and cannot divest or disturb any right or occupation of the lawful tenant." Sect. 2 of the Land Act, 1881, prohibiting the subdivision of holdings without the consent of the landlord in writing applies to all tenancies, while the similar provision in sect. 5, sub-s. 3, affects judicial tenancies. Both sections apply to the tenancy in this case. The sections mean that the prior consent of the landlord to the subdivision must be obtained in every case, and that subsequent consent, as under sect. 10 of Deasy's Act, is not enough.

A consent given after the date of the assignment does not operate retrospectively : *M'Grath* v. *Ahern* (6). The basis of the decision in *O'Connor* v. *Foley* (7) was that the deed in question contained a covenant for further assurance. Such possession as the defendants had in this case does not amount to part performance ; and a suit for specific performance could not be maintained : *Meara* v. *Meara* (8). Where the direct object aimed at

(1) [1896] 2 I. R. 273.
(2) [1897] 2 I. R. 591.
(3) [1900] 2 I. R. 359.
(4) [1903] 2 I. R. 417.
(5) [1896] 2 I. R. 273.
(6) 20 L. R. Ir. 341.
(7) [1906] 1 I. R. 20.
(8) 8 Ir. Ch. R. 37.

is illegal, how can the indirect intention to effect the very same purpose be legal? *Doody* v. *Nolan* (1). In *Leitch* v. *Simpson* (2) the defendant had ascertained that the landlord was willing to give the consent required by sect. 10 of Deasy's Act. If specific performance were decreed in this case, it might involve the sale of the plaintiff's holding by the Land Commission.

In order to bind the plaintiff by some equity existing against her predecessor, it must be shown that she had notice of it. Under the assignment of 1909 the plaintiff's late husband became a purchaser for valuable consideration of the holding, without notice of any right or equity against the holding, such as that now claimed by the defendants. The onus of proving such notice was upon the defendants: *Bainbrigge* v. *Browne* (3).

The plaintiff got an indefeasible title to the holding, including the plot in dispute. Until the vesting order was made the conditions of the tenancy subsisted: *In re Lynders* (4). True, the interest of tenant-purchasers was vested in them, under sect. 8 of the Purchase of Land (Ireland) Act, 1885, subject to any rights or equities which affected the tenancy. The defendants had no rights or equities within the meaning of that section. A title under the Statute of Limitations cannot be acquired by a person in possession under an arrangement contrary to the provisions of the Land Law and Land Purchase Acts. In any event twelve years had not elapsed to bind the term before the date of the acquisition of the fee, and twelve years had not elapsed since the date of the purchase under the Land Purchase Acts.

Serjeant Sullivan, in reply.

Cur. adv. vult.

SIR JAMES CAMPBELL C.:—

The subject-matter of this unfortunate litigation is a strip of ground less than a quarter of an acre in extent, with a small shop upon it, originally erected at a cost of £30. This strip is portion of a larger plot, the whole being less than one acre, and having upon it a creamery which is at present disused. It was originally a piece of waste ground included in a farm of some fifty acres

(1) 2 L. R. Ir. 199, at p. 211.
(2) I. R. 5 Eq. 613.
(3) 18 Ch. D. 188.
(4) [1910] 1 I. R. 231.

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situate at Ballyfoliah in the county of Cork, which prior to 1906 was held by one Peter O'Regan as a tenancy from year to year subject to the judicial rent of £22 10*s.*, fixed in the year 1893. Peter O'Regan had two children, a son named Timothy and a daughter Hanora. The daughter had married her present husband, Robert White, in October, 1902, and in 1910 Robert White was acting as manager of the creamery for his father-in-law, Peter O'Regan, while his wife was conducting a business of some sort in the little shop. It is the common case that in 1906 Peter O'Regan made a letting at £4 a year of the creamery to Robert White, but whether this letting also included the shop or strip of ground or both was always one of the matters in dispute. In 1906 Peter entered into an agreement in the usual form for the purchase of his holding under the Land Purchase Acts and by the fiat of the Land Commission, in lieu of a vesting order, the holding was vested in him as from the date of the purchase agreement. In October, 1909, Peter assigned to his son Timothy, on the occasion of his marriage, all his estate and interest in the farm save and except the creamery, which was reserved to Peter and his wife Mary during their joint lives. Peter, Mary his wife, and Timothy his son all died in the year 1916, and Margaret, the widow and administratrix of Timothy, is now the owner of the farm. She is the plaintiff in the present action, out of which this appeal arises, and according to her evidence the litigation started immediately after her marriage in 1910, in consequence of the refusal of the Whites to allow Peter O'Regan to dig in, or interfere with, this small strip, of which at that time they were in possession as well as of the creamery and shop. Peter proceeded against the Whites in the County Court by civil-bill process for trespass on this plot, and obtained a decree; but on appeal this decree was reversed, and changed into a dismiss without prejudice. It is important to note that on this occasion, as sworn by Margaret O'Regan in her evidence on the present action and not contradicted, the case made by the Whites was that this strip went with the creamery and shop, or in other words was included in the letting of the creamery in 1906. Peter appears to have acquiesced in this decision, and to have allowed the Whites to remain in possession, upon this basis, of creamery, shop, and disputed strip; but after his death and that

of Timothy in 1916, the present plaintiff, Timothy's widow, served the Whites with notice of the assignment of 1909, and with a notice to quit the creamery, shop, and strip, treating all three lots as held by the Whites as yearly tenants at £4 a year under the letting of 1906, as sworn by them in 1910. A civil-bill ejectment founded on this notice to quit was then in the year 1917 brought by the present plaintiff for the recovery of all the premises, and a decree for possession was given, but upon appeal to the judge of assize the decree for the possession of the creamery was affirmed, but varied by striking out the shop and disputed strip. Upon this occasion there was a complete change of front on the part of the Whites, who, abandoning the case made by them in 1910, that this strip was included in the letting of the creamery, alleged that they had got possession of it as a marriage portion at the date of their marriage in 1902. Finally, in December, 1917, Margaret O'Regan commenced this present action by writ of summons to recover the possession of the premises comprising the shop and strip, and the Whites, by their statement of defence, paragraph 2, specially pleaded that they obtained possession of this strip at the date of their marriage under an arrangement with Peter O'Regan whereby he agreed to give it to them for all his estate and interest therein to enable them to build a shop upon it.

It is remarkable, however, that at the trial of this action another change of front was made and this defence abandoned, and the case that was made by them was in effect that there was no arrangement at the time of the marriage in October, 1902, but that in the December following Peter sent for them to Donaghmore, where the male defendant was managing another creamery, and on their arrival made an arrangement, the terms of which are to be found in the following extracts from their evidence as contained in the report of the trial by Gordon J., before whom and a common jury the case was tried at the Cork Assizes in March, 1918. The female defendant's evidence was as follows:—"My father said he would put up the shop for us. He to pay and we to pay, and we were to run it. The shop cost £15 for each. We have been in possession since the shop was finished before April, 1903. We cultivated the plot and drained it." The defendant Robert White swore:—"Old Peter said if I got liberty from my

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employers and came back to manage the creamery I could build a shop and he would go half in it, and I could have it for my life and my wife's. I was to be the owner, to have it for my property, and never to be disturbed out of it." The whole of the evidence is confined to the shop or site for a shop, and the defendants seem to have carefully abstained from pledging themselves to any specific allegation as to how or when they got possession of the strip itself, though I will assume in their favour that by the evidence I have quoted they were referring to the shop and strip of ground as one and the same subject-matter. It is, perhaps, not unnatural that in this constant shifting of the case made on behalf of these defendants Gordon J. should, in the summary to be found in his report of the proceedings at the trial of the respective contentions of the parties to the action, have fallen into error as to the exact nature of the defence, though it is more difficult to understand why he should also apparently have mistaken the case made for the plaintiff. He states that "it was contended by the plaintiff that the letting of 1906 included the creamery, the shop, and the plot of ground." Such a contention is in conflict with the statement of claim in this action itself, which specifically alleges that the letting of 1906 was confined to the creamery and shop, and that the defendants in or about 1910 encroached upon the shop in dispute. The plaintiff swore that Peter had told her that the shop was included in the letting of 1904, and the case made at the trial plainly followed the pleading in treating the occupation of the plot by the defendants as an encroachment on this letting. So in describing the contention of the defendants he states it to have been that Peter O'Regan gave them the entire of his estate and interest in the plot to build a cottage on it and establish a business, apparently overlooking the fact that while this is the case made by the defendants in their pleading, it essentially differs from that to which they swore at the trial. A further complication is created by the unfortunate way in which the question which was to decide this main issue between the parties was submitted to the jury. It reads as follows:—"In the year 1902 did Peter O'Regan promise defendant, Robert White, that if he came back and managed the creamery he would give him the plot of ground absolutely, and assist him in building a

shop upon in?" Answer, "Yes." The meaning and effect to be given to this question and answer have been keenly contested on the hearing of this appeal, counsel for the plaintiff contending that they must be construed in the light of the oral and documentary evidence in this case, and that in no event can they be interpreted as affirming in favour of the defendants a title to the plot in dispute greater than, or in excess of, that which was claimed or sworn to by themselves, while for the defendants it is insisted that upon their legal construction they affirm an executory contract on the part of Peter O'Regan for the transfer of the fee in this plot to them. Holding, as I do, that no such contract was ever for one moment present to the mind of any of the parties, and failing to find a particle of evidence in support of it, I must decline to decide that from the mere introduction of the word "absolutely" into this question the Court is coerced so to construe this question and answer as to produce a result directly in conflict with the intention of the parties and the entire evidence in the case, or to interpret it otherwise than as being, in the intention of Gordon J. and to the knowledge of the parties, a rough-and-ready way of asking the jury if they accepted the evidence of Robert White, that he was to have the uncontrolled or absolute ownership of this plot for his own life and that of his wife. In my opinion this evidence must be read as a whole and as a full and complete description of the estate or interest he was claiming. His statement as to this is definite and specific in confining its duration to his own life and that of his wife; and it is only in respect of this estate or interest that he adds that he was to be the owner, to have it for his own property, and never to be disturbed out of it; and I can hardly imagine from the lips of a witness who was not himself a lawyer a better description of the estate he was claiming. The members of the jury, as "the men in the street," would undoubtedly so understand it also, and I cannot attribute to them a knowledge of any technical meaning of this word "absolutely," or assume that Gordon J. in his charge explained to them the meaning and effect of the question in any sense other than that which was warranted by the evidence given in open Court in the hearing and presence of himself and them. The meaning of this word when used in a deed was considered in two cases in the Irish Courts. In *Keogh*

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v. *M'Grath* (1) Sir Edward Sullivan M.R. held that in the light of a number of contemporaneous documents it was to be construed as conveying the fee, but in the later case of *Lysaght* v. *M'Grath* (2) May C.J., in construing the same deed, held that only an estate for life was conveyed.

This case, so trivial in itself, might involve consequences of startling and far-reaching importance in principle, applicable to rights and property of unlimited value, if this Court were coerced to decide from the mere use of this word that a sale or transfer of the fee was to be necessarily implied, and it is on this account that I have dealt with it at such length. Assuming, therefore, that the jury accepted the evidence of the defendants to its fullest extent, it amounts to this, that not on the occasion or in consideration of the marriage, for this issue was never raised at the trial, nor was any question upon it submitted to the jury, but at a subsequent period, they went into occupation of the premises on the terms that the male defendant should manage the creamery, that Peter and they should erect a shop on this strip at an expense of £30, to be jointly defrayed, and that the shop and strip should be the property of the defendants for their lives. The only consideration that Peter obtained on this arrangement, apart from natural love and affection, was the promise by the male defendant to manage his creamery, but being a promise for personal service, no contract based upon it could be specifically enforced on either side.

Further, it is clear, in my opinion, upon the evidence of the defendants, that the arrangement sworn to by them contemplated and was in fact followed by the immediate taking of possession by them of the strip in question as the erection of the shop was completed in the following April. This practically disposes, in my opinion, of all the arguments that have been based upon the assumption of an executory contract to transfer the fee. Once this assumption is out of the case, and the finding of the jury construed in compliance with the evidence, the arrangement under which the defendants upon their own admission immediately entered into possession involved an agreement for the sub-division of the holding. Assuming that the occupation under an executory contract for the assignment or subletting of a portion of his holding,

(1) 5 L. R. Ir. 478. (2) 11 L. R. Ir. 142.

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by a judicial tenant without the consent of his landlord, may be lawful in the sense of enabling the occupier to maintain process against a trespasser, I am of opinion that possession taken and retained under any such contract cannot be relied upon, in the absence of such consent, as part performance, inasmuch as such possession operates as a subdivision in fact, and is a breach of the provisions of the statute. The legislation of a century, dealing with the relations of landlord and tenant in Ireland, essentially differing in this respect from that which has been passed for England, has shown a consistent policy and increasing stringency in the prohibition of all such attempts on the part of a tenant without the consent in writing of his landlord, not so much for the protection of the latter, but, in the public interest, to prevent the multiplication and consequent congestion of uneconomic holdings, the source of constant poverty and the cause of recurrent agitation in this country. It would be a waste of time to review the long list of cases in which this view has been upheld, many of which have been discussed before us in the argument, which included the inevitable reference to the reductio ad latrocinium of Christian L.J.

In the present case Peter O'Regan did not acquire the fee of his holding until the date of the fiat in 1915, even though when given it related back to the purchase agreement of 1906; and it is not pretended that at the date of the arrangement or at any subsequent period the consent of the landlord was ever asked or obtained, and I should be running counter to this declared policy were I, for the purpose of giving validity to a transaction prohibited by statute, to grasp at any fiction which would assume an express or implied intention or undertaking upon either side to procure this consent, or which would attribute the occupation by the defendants to some speculative arrangement or license other than that asserted and sworn to by themselves. Had Peter given effect to the arrangement by assigning in writing this plot and shop to the defendant for his own life and that of his wife, it would have to be admitted that the transaction was a breach of the statute, and I fail to understand why the result should be different when the defendant is driven to rely upon a parol arrangement, followed by possession and part performance.

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Counsel for the defendants have strenuously argued that the jury by their findings have affirmed an executory contract by Peter for the transfer of the fee in this strip, in the belief, as I assume, that such a verdict would justify their reliance upon the decision in *O'Connor* v. *Foley* (1); but, even on that assumption, the case, in my opinion, essentially differed in its facts from those in the present case. In that case Henry O'Connor, being in possession of certain leasehold premises under an assignment without the required consent of the landlord, had converted his interest, pursuant to the provisions of the Land Law (Ireland) Acts, 1881 and 1887, into a statutory tenancy from year to year, subject to a judicial rent. He had previously, in the year 1876, on the occasion of the marriage of his son, executed a marriage settlement, by which he assigned the lands to trustees on trust for himself for life, with an ultimate trust (in the events which happened) for the children of this son in equal shares; and this deed contained a covenant by him for further assurance.

It was held that, by his act in converting the leasehold into a statutory tenancy, he had estopped himself from denying that he was assignee, and that, inasmuch as he thereby became entitled to sell or assign this statutory tenancy in manner prescribed by the Land Acts, the independent and collateral covenant for further assurance in the settlement of 1876 enured for the benefit of the children of his son, so as to give validity to the ultimate trust in their favour. It is to be noticed that the Court in that case had to deal with an assignment of the entire interest, and not with a subdivision or subletting. Had it been a case of attempted subdivision or subletting, I think it is plain from the judgments that the decision would have been to the contrary effect. Further, the persons entitled in ultimate remainder would never have an estate in possession until after the death of the tenant for life; consequently the circumstance that he became entitled to make a valid assignment applied before any entry by them in breach of any statute, whereas in the present case the agreement relied upon, however it is construed, contemplated and involved the immediate taking of possession, and

(1) [1906] 1 I. R. 20.

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was, therefore, in my opinion, in law and in fact, a subdivision in breach of the statute.

In *O'Connor* v. *Foley* (1) the attempted assignment was by deed, and although the assignor was in a position to give effect to it, the Court was only able to pronounce in favour of its validity by calling in aid, as an independent contract, the covenant for further assurance; but in the present case the defendants are driven to rely upon the doctrine of part performance in support of a parol agreement. They were never, in my opinion, at any time entitled to have this agreement specifically performed, once they negatived its dependence upon the consideration of the marriage, as it lacked the element of mutuality if the only consideration for the promise by Peter was the promise by White of his personal service, while the acts of part performance relied on affirm of themselves the fact of subdivision, and a claim for an equity to an illegality, in the language of FitzGibbon L.J. in *In re Turpin and Ahern's Contract* (2).

I am also satisfied that there never was any agreement, express or implied, on the part of Peter to obtain the consent of his landlord to the subdivision, nor any ratification or adoption of it by Timothy, while plaintiff, as his successor in title, has expressly repudiated it by the issue of the writ in the present case.

Having regard to the opinion I have expressed upon this part of the case, it is not necessary for me to pronounce an opinion upon the argument addressed to us by counsel for the plaintiff as to the effect of the fiat of the Land Purchase agreement, or the subsequent registration of his title by Timothy O'Regan, though I think it follows that neither at the date of this fiat, nor at the date of the registration, had the defendants any estate or interest, legal or equitable, in the plot in dispute, to which the vesting or registration would be subject.

In arriving at this conclusion I have not overlooked the fact that, as Gibson J. points out and as many decisions establish, an arrangement such as that which was affirmed by the jury in this case would in England create such an estate or interest as would be recognized and given effect to in a Court of Equity; but these

(1) [1906] 1 I. R. 20. (2) [1905] 1 I. R. 85, at p. 102.

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English decisions have, in my opinion, no bearing upon the facts of this case, by reason of the fundamental distinction, resulting from the absence of any legislation in that country similar to what is to be found in our Irish land code, prohibiting sub-division or sub-letting by a judicial tenant without the prescribed consent. As to the defence relying on the Statute of Limitations, it could not, in my opinion, upon the dates in this case have any application unless I was prepared to adopt the ingenious suggestion of Serjeant Sullivan, and hold that, notwithstanding the purchase under the Land Purchase Acts, the judicial tenancy from year to year was preserved and was still in existence. In my opinion, the effect of the purchase was to vest the lands in fee simple in Timothy O'Regan, subject to the statutory provisions which direct the devolution of the estate in the case of intestacy to follow the law applicable to personalty. In all other respects the lands became, by the operation of purchase, real estate, and the estate so acquired is an estate in fee simple. An express decision to this effect by this Court will be found in last month's number of the Law Reports, Ireland; I refer to the case of *Farrelly* v. *Farrelly* (1). In my opinion, this appeal fails upon all the grounds upon which it was argued, and it should be dismissed, and the decision of the King's Bench Division affirmed with costs.

I must express my regret that both in 1910 and again in 1917 the Judges of Assize in deciding the appeals should have failed to determine the rights of the parties, and that by a dismiss without prejudice on the first occasion, and the striking out of this plot in dispute on the other, the questions in issue were left to be settled at ruinous expense in this present litigation, at a time when all the material witnesses on one side of the arrangement had passed out of life.

RONAN L.J.:—

To narrow the question in this case, I shall deal first with the plaintiff's title. She is administratrix of Timothy O'Regan, whose title rests on a "fiat" or vesting order of the Land Commission, dated the 25th of February, 1915. That fiat has the effect of a Landed Estates Court conveyance under sect. 8 of

(1) [1918] 1 I. R. 488.

the Land Act of 1881 (44 & 45 Vict. c. 49). By the proviso, however, "the interest thereby vested in the purchaser as tenant of the holding . . . shall be deemed to be a graft upon the previous interest of the tenant in the holding, and be subject to any rights or equities arising from its being such graft."

In this case the fiat was made under sect. 34 of the Irish Land Act of 1896 (59 & 60 Vict. c. 47), which provides: "The Land Commission shall prepare the vesting order or, if they see fit, fiat the agreement . . . subject to such conditions, exemptions, and modifications as they think necessary." The power of the Judge of the Landed Estates Court to give a statutory title is obviously one to be exercised with the utmost care. So, in the case of the vesting order or fiat, this power is vested in a judicial tribunal, the Irish Land Commission, and the statute expressly requires it to be prepared by the tribunal. It really invokes a judicial decision as to what provisions are to be made for the rights of third parties, which would otherwise be destroyed. There is no limit to the judicial discretion in this matter. The agreement to purchase was between Peter and the landlord, and was made on the 1st of March, 1906. Peter having died, Timothy became the tenant. By the fiat the holding was vested in Timothy O'Regan to *such uses nevertheless and upon and for such trusts and purposes, and with and subject to such powers, provisions, charges, and incumbrances to, upon, and subject to which the holding would now stand limited if an order had been made vesting the said holding in the original purchaser at the date of the within agreement.* Holding here means "the parcel of land discharged from the tenancy (Act, 1881, s. 57).

The words I have italicized speak for themselves. There can be no doubt as to their meaning. They rule this case. The attention of the King's Bench Division does not appear to have been called to the special terms of the fiat. They were only referred to in this Court when, at a late stage of the argument, a member of the Court asked for the original fiat.

Timothy accepted the estate under this fiat, and therefore he was, and the plaintiff is, absolutely bound by its terms, conditions, and trusts. The case, therefore, narrows itself to the question—What trusts would have affected the lands if Peter had acquired the fee on the 1st of March, 1906?

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On reading the judgments, it is plain that the sole ground of the decision in the Court below was that the contract was unlawful by reason of the Irish Land Acts. There is no suggestion or hint that there was any difficulty in ascertaining what the contract was; nor was there any suggestion that there was not complete legal proof of part performance so as to make the parol evidence admissible; nor had the King's Bench Division any doubt that if the contract was valid there was an equitable estate in the defendant which entitled him to judgment.

What was the contract? The present motion is a motion under Order 40, rule 4. Attention was called to this during the arguments; and it was never suggested that it should be treated as an ordinary motion for judgment or a new trial. In such a proceeding "there is no power to question the findings of the jury" (Wylie, p. 593, and cases cited). The findings, therefore, in the present case are conclusive. The Court cannot enter into the questions arising on a new trial motion as to the evidence in support of the findings. The first finding is as follows. [His Lordship read the finding.] In my opinion, even if this was a new trial motion, there was ample evidence to sustain this finding.

The entire evidence of the contract is contained in the evidence of Robert White and of his wife. He said: "There was no agreement about the plot till December, 1902." Old Peter said: "If I got liberty from my employers and came back to manage the creamery, I could build a shop and he would go half in it, and I could have it for my life and my wife's. I was to be the owner, to have it for my property, and never to be disturbed out of it." Mrs. White said: "My father sent for us to Donoughmore, and he said he would put up the shop for us. He to pay and we to pay, and we were to own it. The shop cost £15 for each. We have been in possession since the shop was finished."

It is plain that defendant was in employment somewhere else (at Donoughmore), and that he required liberty from his employer to enable him to "come back" and manage the creamery. The defence says that defendant was manager of a creamery at Donoughmore. Gordon J. refers to this in his report.

It is plain that this was a conditional promise, and that the performance of his part by defendant was a condition precedent

to his right to have the land given to him. It cannot have been the intention if defendant came back and managed the creamery for a week and then returned to his former employment, that he could have required an assignment of the land, although I am of opinion that it was part of the arrangement that he should have possession of the shop and plot so long as he managed the creamery. But how long was he bound to manage it? Taking the strongest view against the defendant, it would be as long as Peter should require him to do so.

It appears from the statement of claim that "in the year 1906 Peter made a letting of the disused creamery . . . to the defendant, who continued in occupation under this letting up to October, 1917." I therefore think the letting in 1906 discharged the defendant from the further management of the creamery, and that the consideration for the contract was then completely executed, and his right to get the farm became absolute and immediate. The agreement was conditional; it did not become absolute and enforceable until the consideration had been performed. The jury have found that it was performed, and no question has been raised as to the performance of the consideration.

In order to ascertain upon what trusts Timothy took the lands under the vesting order, it is necessary to see what the trusts would have been if the lands had been vested in Peter on the 1st of March, 1906. This depends on the law of contract and on the law of equitable assignment and trust. What was agreed to be given was either an estate for the lives of defendant and of his wife or an estate in fee. Either would be a defence to this action. In either case, it was to be a simple absolute gift. I use the word "gift," following the finding and the evidence, but I need hardly say it was an agreement for valuable consideration. As between trustee and cestui que trust it would entitle the latter to possession, when it bound the land and the trustee. (Lewin on Trusts, p. 867.) I think the Judges in the King's Bench did not sufficiently attend to the distinction between a contract and the performance of the contract. At the date of the contract, Peter could not perform it. But if he obtained the landlord's consent or acquired the fee, he could then perform it. The trust is what it would have been if Peter had acquired the fee in 1906. It is elementary law

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that the fact that a party cannot perform a contract at the time he makes it does not make the contract void either in law or in equity. The principles of equity as to the assignment of after-acquired property all rest on this. In 1846, in *Carne* v. *Mitchell* (1), the Vice-Chancellor said, "It is an undeniable proposition that where a party entered into a contract without having the power to perform it, and afterwards acquired the right which he had contracted to dispose of, he was then bound to perform it." "Where a party enters into a contract without at the time having the power of performing it, and afterwards acquires that power, he is bound to perform the contract he has entered into." (Fry, 5th ed., p. 487.)

The power to perform contracts to assign land depends on title. Strictly this question only arises on the inquiry as to title in a specific performance suit. (Fry, p. 487.) "The inquiry is whether the vendor can make a good title, not whether he could do so at the date of the contract." (Fry, p. 664.) "Where the vendor cannot control the person whose consent or concurrence is necessary in the conveyance, it is a question of title, not of conveyance": per Lord Parker (then Parker J.), in *Halkett* v. *Dudley* (2). It was on these broad principles that the case of *O'Connor* v. *Foley* (3) was decided. It might be thought from the argument for the respondent that the decision in that case was relied on as the main authority for the proposition that an executory contract to convey lands was not within the subletting Acts. This was not even argued; such a contract was assumed, and admitted to be valid. The only point argued was, that where such a contract was contained in a covenant for further assurance in an assignment void under the subletting Acts, it was ancillary to the void assignment, and fell with it. The point decided was that the covenant was valid, although it was contained in and ancillary to such an assignment.

A contract, in addition to being a promise to do something in the future, may also operate as a conveyance of property. Thus, a contract for the sale of goods may operate so as to pass the property in the goods. This is, as far as I know, the only case

(1) 15 L. J. Ch., at p. 287. (2) [1907] 1 Ch. 602.
(3) [1905] 1 I. R. 1; [1906] 1 I. R. 20.

in which a contract passes the legal estate in property, real or personal, at common law. In equity, on the other hand, a contract may operate as an equitable assignment of any property, or of property to be acquired thereafter.

In *Holroyd* v. *Marshall* (1), the question arose on a covenant that all machinery thereafter to put in a mill should be subject to a mortgage created by the deceased. In *Tailby* v. *Official Receiver* (2), the question arose on "an assignment of all book debts due and owing, or which might during the continuance of the security become due and owing to the mortgagor." These were cases of equitable assignments of future property. Neither was a case of specific performance. In both it was held that when the mortgagor acquired the property answering the description, it was bound by the instrument. As I have said, in the former case it was a covenant; in the latter, an actual assignment in form, not a covenant or contract. It is important to see that this difference is immaterial. I cite two passages from the judgment of Lord MacNaghten in the latter case. "The claim of the purchaser was rested on well-known principles. It has long been settled that future property, possibilities, and expectancies are assignable in equity for value. . The mode or form of assignment is absolutely immaterial, provided the intention of the parties is clear. To effectuate the intention, an assignment for value in terms present and immediate has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified" . . . "*Holroyd* v. *Marshall* (1) laid down no new law, nor did it extend the principles of equity in the slightest degree. Long before *Holroyd* v. *Marshall* (1) was determined, it was well settled that an assignment of future property for value operates in equity by way of agreement binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, that whenever

(1) 10 H. L. Cas. 191, 211. (2) 13 A. C. 542, at pp. 543, 546.

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persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust." In *Holroyd* v. *Marshall* (1) the Lord Chancellor (Lord Westbury) said:— "In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a personal transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of Equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee, subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such that a Court of Equity would direct to be specifically performed." "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained." *Holroyd* v. *Marshall* (1) was decided in 1862; *Tailby* v. *Official Receiver* (2) twenty-six years later, in 1888.

Now, if we compare these passages of Lord Westbury's judgment with those of Lord MacNaghten's, it will be seen that they agree save in one particular. Lord Westbury limits

(1) 10 H. L. Cas. 209, 211. (2) 13 A. C. 522.

his propositions to cases where equity would decree specific performance. There is no such limitation in Lord MacNaghten's judgment. The main proposition is that a valid contract operates as an equitable assignment. The latter passage in Lord Westbury's judgment states two propositions—1. That a Court of Equity would specifically perform the contract. 2. That the contract would in equity transfer the beneficial interest in the property immediately on the property being acquired, "and the vendor would hold it in trust for the purchaser." There is then this limitation: "This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree specific performance." This plainly applies to 1 and 2. This is, of course, obvious as to 1. But, to put it shortly, the House of Lords, in *Tailby* v. *Official Receiver* (1), decided that this limitation has no application to 2. The judgments of Lord Herschell, p. 531; of Lord Watson, pp. 533–535; and particularly of Lord MacNaghten, pp. 544–549, put this beyond doubt. We must, therefore, read Lord Westbury's second proposition without the limitation as to specific performance. This, I think, has been settled law since 1888.

Lord MacNaghten further says at p. 547:—"Greater confusion still, I think, would be caused by transferring considerations applicable to suits for specific performance, involving, as they do, some of the most distinctive and most difficult questions that come before the Court, to cases of equitable assignment or specific lien, where nothing remains to be done to define the rights of the parties; but the Court is merely asked to protect rights completely defined by the terms of the contract, or to give effect to such rights either by granting an injunction, or by appointing a receiver, or by adjudicating on questions between rival claimants." Every word of this applies to the present case. The defendant asks the Court to protect his right as equitable assignee and cestui que trust against his trustee, who claims the trust property as his own, and seeks to evict the cestui que trust from the possession to which he is entitled.

Twenty-one years later we have the view of Lord Parker's judgment to the same effect in *Jones* v. *Tankerville* (2). Here the defendant is equitable assignee in possession. The plaintiff

(1) 13 A.C. 522.

(2) [1907] 2 Ch. 440, 443.

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has the legal estate in trust for him. The defendant is entitled to the possession in equity. Surely the principle applies that equity would protect the equitable possession and title by restraining the action based on the legal title.

These cases establish that if the fee had been vested in Peter in 1906, he would then have held the legal estate in the lands in trust for the defendant, and this is the trust which bound the lands and Peter's estate therein, and the trust expressly fastened on Timothy by the fiat. They also establish that it is not necessary to show that the contract is one that the Court would specifically perform. The remedy by injunction is sufficient. All that remains to be done is to prove the contract in fact, and to show that it is valid; the subsequent putting defendant in possession is wholly immaterial, except so far as it relates to part performance.

The next question is as to the validity of the contract. What is the contract? It is contract to grant, on performance of the consideration, an estate in fee or for the lives of the defendants: the principle is the same. It is not a contract to assign the yearly tenancy. Still less is it a contract to assign the yearly tenancy without the consent of the landlord. The cases already cited in my opinion establish clearly the validity of the contract. I take a simple illustration. A agrees with B that if he will marry his daughter C he will grant him the fee of part of the lands of X. A has no title to X. B marries the daughter. A subsequently acquires the fee in X. The cases show beyond doubt that if A had no title at all to X at the date of the contract the contract was valid, and that when he acquired the fee he would hold it in trust for B. Does the fact that at the date of the contract A had some interest in X, though not such an interest as would enable him to grant the fee, make the contract void and prevent the operation of the trust? Surely not. In truth a contract to grant an estate which a man does not possess or has not the power to grant is really a contract—1, to acquire the estate or power, and 2, then to grant the land. It is the only way in which he can perform his contract. This was a contract to grant either the fee or an estate for the lives of the defendants. An assignment of the tenancy would not be a performance of the contract. If Peter acquired the

entire fee or the ultimate reversion, he would then, and then only, be in a position to grant the estate. His contract was therefore—1, to acquire the reversion, and then, 2, grant the estate to the defendants. Can it be suggested that sect. 2 of the Act of 1881 has any application to this contract, or that there was anything illegal in it? Can there be any doubt that if Peter had failed to acquire the reversion the defendants could (if the contract had been in writing) have brought an action for damages for breach of contract on proof of contract and of performance of the consideration? The law provides a special measure of damages in such a case where the non-performance arises from failure to show title to convey.

A contract by A to grant the lands of X cannot affect the lands in equity save to the extent of A's power to dispose of them. So long as they are the property of B, A's contract cannot affect them. Until A acquires the lands it is a purely personal contract. Section 2 of the Act of 1881 only deals with a tenancy. The express trust in the fiat only arises on the determination of the tenancy, and is only attached to the fee simple thereby granted. "The holding" mentioned in the fiat is "the parcel of lands discharged from the tenancy" in the definition in sect. 57 of the Act.

It cannot be suggested that there is or ever was any statute providing that a contract by a tenant from year to year to acquire the fee and grant it to A is void. On this plain ground I am of opinion that the Judges of the King's Bench Division were wrong in holding the contract void.

This case was argued by the respondents as if the contract was not a contract to grant a freehold estate in the land, but a contract to assign the tenancy. The authorities relied on were all cases of assignment of tenancies. I shall now deal with the case on this assumption. This aspect of the case, in my opinion, raises legal questions of far-reaching importance. They may be indicated in a very few words to an Irish lawyer, thus: Does the principle of the decision in *Gilman* v. *Murphy* (1) (the well-known reductio ad latrocinium case which dealt with a legal assignment of the term) now extend

(1) I. R. 6 C. L. 34.

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to and invalidate in the same way—(*a*) executory contracts for assignment; (*b*) equitable assignments and declarations of trust; (*c*) contracts dealing only with the possession as distinguished from the ownership; (*d*) acts dealing with the possession only, or is it confined to legal assignments? I shall first deal with the question on principle. The contract was a contract to assign the tenancy, not a contract to assign it without the landlord's consent. Has a contract ever been held void because, though capable of lawful performance, an attempt might be made to perform it by an act prohibited by statute?

A contract to assign a tenancy in lands imposes two obligations—1, to show a good legal and equitable title to that tenancy; 2, to make an effectual conveyance of the legal and equitable title in the tenancy. Nothing short of this is a performance of the contract. In this case, a legal assignment of part of the lands in the tenancy would be a division of the holding within sect. 2 of the Act of 1881. The authorities I have already cited show—1, that the landlord's consent in writing is part of the title: *Halkett* v. *Dudley* (1); 2, that the inquiry in an action is whether the vendor can then make a good title, not whether he could do so at the date of the contract: (2): 3, "It is elementary law that the fact that a party cannot perform a contract at the time he makes it does not make a contract void either in law or equity": *Holroyd* v. *Marshall* (3). A contract to assign a tenancy within sect. 2 of the Act of 1881 therefore implies a contract to obtain the landlord's consent, or to make a good title and an effective conveyance otherwise, e.g., by acquiring the fee. The legal estate in the tenant's interest could only be assigned by deed or by writing, under sect. 9 of Deasy's Act, which says, "and not otherwise." It cannot be contended that the verbal agreement constituted a legal grant of the lands. Part performance is part of the law of evidence as to proof of contracts. It has no application to a legal conveyance. Even if the contract in this case was for the term only and was in writing, it would not have been a legal assignment of the term under sect. 9 of Deasy's Act. See *Doran* v. *Kenny* (4); *Manning* v. *Saul* (5).

(1) [1907] 1 Ch. 602.
(2) Fry on Specific Performance, 4th ed., p. 430.
(3) 10 H. L. Cas. 191, 211.
(4) I. R. 3 Eq. 148.
(5) 26 L. R. Ir. 640.

The respondents argued that as an executory contract for assignment was void under the former sub-letting Acts, an executory contract to divide is void under sect. 2 of the Act of 1881. The Irish legislation prohibiting assignment and subletting is contained in four statutes: the 7 Geo. 4, c. 39; 2 Wm. 4, c. 17; 23 & 24 Vict. c. 154 (Deasy's Act); and the Land Act of 1881.

The provisions in these Acts are of two classes—first, those prohibiting assignment and subletting without the landlord's consent, though there is no covenant to that effect in the lease. The first and last are of this class. The other class (the second and third) prohibits the assigning or subletting contrary to the covenants in the lease. In the former case the question whether a particular case comes within the prohibition depends on the words of the statute alone; in the other it depends on the construction of the covenant, provided the covenant is a covenant against "assigning or subletting" within the Act. The form of prohibition varies. In the 7 Geo. 4, c. 39, s. 3, the form is: "It shall not be lawful to assign or underlet . . . and every such assignment or underlease, and every lease, deed, instrument, or other proceeding whereby such assignment or underlease shall be made shall be deemed wholly void and invalid to all intents and purposes." Sect. 9 of this Act, which prohibits a devise by will of the lands "so as to divide the lands between several persons," only contains the words "it shall not be lawful to divide." There is no clause that the devise shall be void.

In 2 Wm. 4, c. 17, s. 2, the form is: "Every such assignment, order, or underlease, and every deed, lease, or instrument or other agreement or proceeding whereby such assignment or underlease shall be made . . . shall be and be deemed wholly void and invalid to all intents and purposes whatsoever." There is no provision that it shall not be lawful to assign or sublet.

In Deasy's Act, sects. 10 and 18, the form is: "It shall not be lawful to assign—to sublet"; no provision that the instrument shall be void.

In sect. 2 of the Act of 1881 the words are: "The tenant shall not subdivide . . . or sublet." The Irish Courts held that the language of the Acts made the assignment, or subletting,

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or devise void as between the parties. The decisions have been very numerous; but one and all have held that the effect of the Acts is the same, simply to make the assignment, or subletting, or devise void. The effect of the sections of Deasy's Act, "It shall not be lawful," has been held to be precisely the same as the provision in the Act Wm. 4, "The instrument shall be void." In the case of these two Acts the application depends on the construction and effect of the covenants in the leases, and consequently the English cases on this subject have always been applied in Ireland. The questions in England arose under conditions of re-entry for breach of covenant.

At common law a tenant had absolute rights (*a*) of contract, (*b*) of conveyance, (*c*) of dealing with the possession, as distinguished from the ownership, of the term. In addition he had in equity an absolute right of disposing of the equitable, as distinguished from the legal, interest. How could he dispose of his interest at law? By assigning the whole or part by deed, by will, by subletting. Subletting is a parting with the possession. But there may be a parting with the possession which is neither an assignment nor a subletting. An assignment of the legal estate in the whole or part of the lands, alone of all these dispositions, brings the landlord into privity with a new person or persons, and makes him liable to them in respect of all his obligations under the contract of tenancy so far as it relates to the part of the land assigned to each. Subletting differs from assignment in this, that there is no privity of estate or contract between the landlord and the sub-tenant.

In the case of assignment of the legal estate in the term, either in the whole or part of the lands, there is complete and direct privity of estate between the landlord and the assignee. In the case of the legal assignment of the whole a new tenant is forced on the landlord, and in case of the legal assignment of a part or parts one or several new tenants of different parts are forced on him. This is called in law "a severance of the term." The principle is stated in 2 Platt Leases, at p. 271, and in the 1914 edition of Foa, at p. 407. The whole subject will be found fully discussed in a learned judgment by Dodd J. in the recent case of *Dooner* v. *Cdlum* (1).

(1) [1914] 2 I. R. 415.

The landlord is protected from severance of the tenancy by the provisions in the three earlier Acts against assignment of part of the lands. This is the only way in which the legal severance could be effected so as to put a new tenant on the landlord. He is similarly protected by the provision against subdivision in sect. 2 of the Act of 1881. Taking the authorities and the three Acts, Geo. 4. Wm. 4, and Deasy's Act, they seem to me to establish —1. That provisions against assignment only apply to legal assignments which affect the operation of the contract of tenancy, and impose a new tenant on the landlord. 2. That sub-letting, which does not do this, requires a special and clear provision to prohibit it. 3. That parting with the possession requires a similar special and clear provision. 4. That all these provisions are construed with extreme strictness, particularly the extension of general words to a parting with the possession. 5. That the object of covenants against assignment was to enable the landlord to prevent the tenant forcing on him a new tenant of the whole or part of the land, and that the special object of extending the covenant to any part of the land was to prevent severance.

I shall now refer to some of the authorities. In *Crusoe* v. *Bugby* (1) the covenant was "shall not assign, transfer, or set over or otherwise do or put away this indenture or the premises, or any part thereof to any person without the consent" of the landlord under seal. There was a sub-lease to defendant, with possession. It was argued that the covenant was meant to restrain not only an assignment of the whole term, but any underlease or change of the possession of the land. Per curiam: "The Courts have always held a strict hand over these conditions . . . The lessor if he pleased might certainly have provided against the change of occupancy, as well as against an assignment, but he has not done so by words which admit of no other meaning." "Assign," "transfer," or "set over" are mere words of assignment; "otherwise do or put away" signifies any other mode of getting rid of the premises entirely, and cannot be confined to the making of the underlease. It was held, therefore, that those words did not provide for a sub-lease or a "change of occupancy or possession," as they admitted of another meaning, i.e. parting with the entire

(1) [1770] 2 W. Bl. 766.

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title to the land. *Crusoe* v. *Bugby* (1) is treated as an important authority by De Grey, by Lord Kenyon, by Ashurst J., by Lawrence J., and by Grose J. in the leading case of *Doe* v. *Carter* (2). It is stated in detail at p. 406 of Platt on Covenants (1829), also in Platt on Leases, and in Woodfall, 8th ed., at p. 528. It is the subject of a separate paragraph (43) in 2 Cruise's Digest, at p. 8. In *Grove* v. *Portal* (3) Joyce adopts this case, pointing out that it had been approved by Sir W. Grant.

In *Church* v. *Brown* (4) Lord Eldon says, at p. 5: "Farther, if the landlord has a covenant against both assigning and underletting, the tenant might by an agreement neither assigning nor underletting put another person in possession of the premises, and parting with the possession in that manner would not be a breach of those covenants. Is a farther covenant therefore not to part with the possession of the premises to be given as a usual covenant? That would not have restrained the defendant from parting with a part of the premises, these covenants having been always construed by Courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation." In *Grove* v. *Portal* (3) Joyce J. (p. 731) based his decision on this judgment. He says: "The dictum I have quoted so far as I can make out has never been disapproved, of. It is quoted in the text-books and considered by the text-writers to be law." I may say that having read many text-books and cases on the subject, this short statement of Lord Eldon's seems everywhere referred to as the ruling authority on the subject. These authorities seem to me conclusive on the question of parting with possession, and the necessity for a special covenant to restrain this. Buller J. in *Roe* v. *Galliers* (5) said: "It is clear that the landlord in this case parted with the term on account of his personal confidence in the tenant; that is manifestly the case in all leases where clauses against alienation are inserted, . . . therefore he has a right to guard against the event of the estate's falling into the hands of any other person who may not manage it so well as the original tenant. Then he puts an imaginary case:

(1) [1770] 2 W. Bl. 766.
(2) [1798] 8 T. R. 57.
(3) [1902] 1 Ch. 731.
(4) 15 Vesey, 238.
(5) 2 T. R. 133 at p. 140.

"Suppose a lease were made for twenty-one years on condition that the tenant shall so long continue to occupy the land personally; there could be no objection made to such a condition, for the personal confidence is the very motive of granting the lease." This judgment is quoted at length at p. 13 of 2 Cruise's Digest. It may be that this passage in the judgment of so eminent a Judge led to the use of the covenant against parting with the possession.

The judgments of this Court in *M'Kay* v. *M'Nally* (1) seem conclusive as to executory contracts and equitable assignments. The judgments of the Lord Chancellor and Lord Justice Deasy as to the object of these restrictive conditions are very important. The narrow and strict construction to be placed on these provisions is clearly shown. The necessity for the assignment of the legal estate so as to create the relationship of landlord and tenant between the lessor and the assignee is strongly shown by the two decisions—(*a*) that a simple covenant not to assign is broken by a legal mortgage by assignment (this creates privity of estate in the lessor); and (*b*) that an express covenant not to mortgage is not broken by an equitable mortgage. This does not create privity of estate between the lessor and mortgagee. The Lord Chancellor in his judgment says: "There are thus two questions in this case—1, Is the equitable mortgage a breach of the covenant forbidding to mortgage or assign? With respect to the first, we must observe that covenants and conditions in leases restraining, assigning, and subletting have been always construed strictly—as Lord Eldon expresses it in *Church* v. *Brown* (2)—'construed by Courts of law with the utmost jealousy to prevent the restraint going beyond the stipulation.' It appears to me that the deposit of the lease and the accompanying letter amount to, and, in my opinion, cannot be placed higher than, a specific agreement for a mortgage. But an agreement for a mortgage, although it may, so far as sale for non-payment of the money secured, bring all the consequences of a mortgage, is yet no more a mortgage than an agreement for the assignment of a lease is an assignment. Would an agreement to assign be a breach of a covenant against alienation? I think not; and so, according to my judgment, did Sir William Grant, in *Weatherall* v. *Geering*" (3).

(1) 4 L. R. Ir. 438. (2) 15 Ves. 265. (3) 12 Ves. 504.

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Palles C.B., in the same case, at p. 450, says: "What is the effect of that transaction? It passed no legal estate in the demised premises. It was nothing but an agreement, to which effect would have been given in a Court of Equity, that the mortgagee should have a lien upon the lease for certain advances; and, possibly, an agreement that the lessee would, when required, execute a legal mortgage." "What I deem material is, that the whole matter rests in contract; that the action of the Court of Equity would have been founded upon the contract. I take the case most against the defendant when I assume that there was an agreement for a legal mortgage, not merely an agreement for a lien. The question then is, is an agreement to execute a legal mortgage 'a mortgage' within the meaning of the covenant? I am of opinion that it is not. It is beyond controversy that an agreement to assign a lease is not a breach of a covenant against assignment."

Deasy L.J., at p. 453, said: "The principle of construction always applied to clauses restricting alienation is that they are to be strictly construed. That is, that the tenant having at common law full power to alien the lands demised to him, for the whole or part of the term of the lease, he is not to be deprived of that power except by words clearly apprising him of the act to cause a forfeiture of his interest. Now, applying that principle to the word 'mortgage' contained in the covenant in this lease, was it so clear that ordinary persons would consider that it applies to a transaction such as is relied on here, which amounts only to an agreement to execute a mortgage that could only be enforced by a Court of Equity? It leaves the legal relation of landlord and tenant still subsisting between the lessor and the lessee which it was the object of the covenant to continue during the subsistence of the lease."

In *Gentle* v. *Faulkner* (1), there was a lease with a covenant that the lessee would not without the consent of the lessor assign or underlet the premises. The tenant (defendant) conveyed to K., as trustee, all his property (except leaseholds) in trust for his creditors, and he declared that he would "stand possessed of the leaseholds upon trust for the said trustee, and to assign and

(1) [1900] 2 Q. B. 267.

dispose of same in such manner as the said trustee should direct for the purposes of these presents." K. went into possession under the deed. Ridley J. held that this was a breach of the covenant, being by virtue of the Judicature Act an assignment of the premises. The decision was reversed by the Court of Appeal. A. L. Smith L.J. said:—"The covenant does not relate to parting with the possession of the premises, but simply to assigning or underletting. What, then, is the meaning of a covenant not to assign the demised premises? In my judgment the meaning is, not to execute a legal assignment. An equitable assignment is not sufficient to operate as a breach of the covenant." . . . I fail to see how that provision [the Judicature Act, sect. 24, sub-s. 3] converts a non-legal assignment into a legal one. Vaughan Williams L.J. said, "I agree." Romer L.J., who was a great equity lawyer and conveyancer, says:—"Upon the first point it seems to me to be clear that a covenant in a lease against assigning the demised premises, in the absence of any context showing that the covenant is to have an extended meaning, covers only a legal assignment. The covenant against assignment is therefore not broken by anything short of a legal assignment. . . . With all respect to Ridley J., sect. 24, sub-s. 4, has no application to the present case. Before the Judicature Act, the Court of Chancery would never have regarded the cestui que trust as a lessee for the purposes of the lease as between the lessor and the lessee, nor would the Court have regarded a declaration of trust by the lessee of the demised premises as a breach of the lessee's covenant against assignment."

Although this case, in my opinion, rules the present case, there is another decision of the Court of Appeal which in its facts comes nearer to the present case: *Horsey Estate* v. *Steiger & the Petrifite Co.* (1). The lease contained a covenant "not at any time to assign or underlet the premises or any part thereof without first obtaining the consent of the lessors in writing." The plaintiffs were the assignees of the lessors. The tenants' interest was assigned on the 18th of January, 1897, to the defendants. The company was wound up, and a new company was registered under the same name in September, 1897. In December, 1897, an agreement was entered into between the old

(1) [1899] 2 Q. B. 79.

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company and the new company, that the old company should sell, and the new company should buy, the premises for the residue of the term, and that the old company should procure the concurrence of all necessary parties. The agreement provided that, though the purchase was not then completed, the new company should be let into possession within seven days from the first allotment of shares, and as from that date should be deemed to have taken over the same, and should, as from that date, pay all rates and taxes. The new company duly entered under the agreement, and remained and were in possession at the time of the trial. Nothing had been done to complete the sale; no assignment had been made, nor any application for the lessors' consent. There was a complete contract effecting an equitable assignment. Possession was given and taken under an express provision in the contract. The question was whether this was a breach of the covenant. But on these facts counsel did not even attempt to argue, in the absence of a legal assignment, that there was a breach of the covenant against assignment. Lord Russell read the judgment, with which A. L. Smith L.J. (who gave the judgment in *Gentle* v. *Faulkner* (1)) and Collins L.J. concurred. He said: (2) "It is admitted that there is no assignment within the covenant." He then holds there was no subletting, and adds: "Had the covenant been, as is of late years often the case, against parting with possession, the plaintiff company would have proved a breach." It shows the complete difference between parting with the possession and disposing of the property.

I would further refer to Foa's Landlord and Tenant, p. 269; where there is a full treatment of this subject, and the law is stated in accordance with these cases. The law is stated to the same effect in 18 Halsbury, pp. 576–577.

Having regard to these authorities, I find it difficult to see how it could be argued that an executory contract to assign was a breach of a covenant against assignment. I asked was there any case the other way. *Meara* v. *Meara* (3) was strongly relied on. It was the only case referred to in which it was suggested that a contract was a breach of the covenant. It was a suit

(1) [1900] 2 Q. B. 267. (2) [1899] 2 Q. B. at p. 92.
(3) 8 I. Ch. R. 37.

by the tenant for specific performance of an agreement to assign premises held under a lease containing a "covenant against assignment or subletting without the landlord's consent."

The statute applicable was the 2 Will. 4, c. 17, s. 2, which only applied to a breach of the covenant, and made the instrument whereby "such assignment shall be made wholly void." The execution of the assignment would be the specific performance of the contract. The plaintiff had not obtained the landlord's consent. If the contract was void, of course no suit could be maintained on it. The Lord Chancellor said (at p. 40): "If the petitioner had first obtained the landlord's assent, he would have had a perfect title . . . Was the petitioner not bound before coming into Court to have made inquiry to know whether the landlord would or would not consent?" [Consent to what? to the assignment the Court was asked to decree.] The only question occurring to my mind is whether I should dismiss the petition or give a conditional decree, like that in *Gilman* v. *Hungerford* (1). I must dismiss the petition. [It appears in a note on p. 39 that the decree in that case was conditional on the landlord's consent to the assignment being obtained.]

So far it is plain that the Lord Chancellor cannot have thought the agreement void. If it was, there was an end of the case. There could have been no decree, conditional or otherwise. The consent to the assignment sought would not make a void agreement valid. However, Sergeant M'Sweeny relied strongly on the statement of the Lord Chancellor on p. 41, made the next day: "I find I must deal with the agreement as incapable of being enforced in this Court, and not proper to be recognized as a binding or valid agreement. I think it would be against public policy to make a decree, or give effect to the agreement, which I cannot recognize as valid for any purpose." It seems to me, taking the whole judgment together, that it only means that the Court would not decree the execution of a void assignment. If the case purports to decide that an agreement to assign is void under the Act of Wm. IV as a breach of a covenant against assignment, I can only say that, in my opinion, it must be treated as overruled by the authorities I have cited. *Meara* v. *Meara* (2)

(1) 8 I. Ch. R. 38, note.

(2) 8 I. Ch. R. 37.

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is not referred to in Cherry; but there is the following passage at p. 33: "An executory agreement for the sale of the interest in a lease with a covenant against alienation is perfectly good without the landlord's consent, provided the vendor is able and willing to obtain such consent to the conveyance": *Jackson* v. *Meteer* (1).

Jackson v. *Meteer* (1) was an action by the vendor of a farm held under a lease with a covenant against alienation against the purchaser for damages for breach of contract in not completing the contract and paying the purchase-money. It was a demurrer. At the date of the contract the consent of the landlord to the intended conveyance had not been obtained. The defendant pleaded that before action the plaintiff did not obtain the landlord's consent. The plaintiff replied that after the making of this agreement he was always ready and willing to obtain the landlord's consent to the assignment. FitzGerald B., in giving the judgment of the Exchequer Chamber, affirming the judgment of the Queen's Bench, said: "The execution and signature by the necessary parties and persons of the conveyance, and the payment of the purchase-money, are concurrent acts; and, up to the proper time for such execution" [i.e. of the conveyance, which is the performance of the contract], "all that is necessary on the vendor's part is that he should be ready, and willing, and able, and that he should offer to procure such execution or signature."

It is obvious that if the original contract was void no action would have been maintainable. There was no suggestion that the consent of the landlord to the contract was necessary. The vendor was ready and willing to show title, and give a valid conveyance. He was, therefore, held entitled to maintain the action on his valid contract. Can there be any doubt that if he was unable to do this the purchaser could have sued him for damages? The suggestion that the obtaining of the landlord's consent by the purchaser was a condition precedent to his suing the vendor is too absurd. The note in Cherry should, therefore be amended by substituting for the words "is perfectly good" the words "can be enforced by the vendor." The entire note deals with the enforcement of the contract, not its validity.

(1) I. R. 7 C. L. 499.

I am, therefore, of opinion that under the first three subletting Acts a contract to assign the whole or part of a tenancy was valid, and did not require the landlord's consent to make it valid.

I shall now deal with the Act of 1881. The provision in the two first Acts is in substance: The tenant shall not (*a*) assign or (*b*) sublet (*c*) the holding or (*d*) any part thereof. In Deasy's Act sect. 10 provides for assignment, and sect. 18 for subletting in the same way. The provision against subletting in sect. 2 of the Act of 1881 is identical with that in the Act of 1860, and must, on the authority of *Ireland* v. *Landy* (1), have the same effect. The same case shows that the word "assignment" must have the same meaning as in the Act of 1860. If one thing is absolutely clear, it is that all through that Act "assignment" and "assignee" refer to legal assignments and legal assignees only. "Assignment" in sect. 10 must mean the same thing as in sect. 9, i.e., the legal assignment which puts the new tenant on the landlord. For the provision against assignment is substituted "shall not subdivide the holding." Why was not the old form (*a*), (*b*), (*c*), (*d*) adopted? Simply because the assignment of the whole was dealt with by sect. 1, and was no longer unlawful. The assignment of part was not dealt with by sect. 1. Subletting is separately dealt with by sect. 2. A legal assignment of part was the only other way by which the holding could be divided by Act inter vivos, so as to give each party the legal estate in his part. If the section had said, "Shall not assign any part of his holding or sublet the holding or any part thereof," could there be any doubt that this would only apply to a legal assignment or subletting? Is not "subdivide," having regard to the context and the three previous Acts, simply a more convenient expression, getting rid of the repetition of the words "holding or any part thereof."

Sect. 2 only applies to tenancies from year to year—the vast majority of cases to which the first section applies. A tenancy from year to year may exist under an agreement containing a clause against assignment, but, except in such a case, at common

(1) 22 L. R. Ir. 403, 424.

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law a tenant from year to year could assign his tenancy or any part of it to anyone. Section 1 is on the face of it an enabling section: "The tenant may sell his tenancy." Sect. 57 provides that "sale, sell, and cognate words shall include alienation with or without valuable consideration." We may therefore read for "may sell" "may assign his tenancy." This would apparently make sect. 1 an enabling section.

How did sect. 1 affect the ordinary tenancy from year to year and the tenant's common-law right of alienation? It seemed as if the draftsman of the section was under the impression that the tenant had no right to sell or alienate without the landlord's consent, and wished to give him that right under the conditions mentioned in the section. In a practical sense this was true, as before the Act the landlord could have served a notice to quit on the purchaser the day after the sale. Ultimately the Courts in this respect treated the enabling section as a restrictive section, and practically decided that it should be read as introducing into every ordinary tenancy from year to year a condition that the tenant should not assign his holding without the consent of the landlord save so far as he was authorized to do so by the section. The section, however, makes no provision whatever for the assignment of part of a holding. Accordingly, it was necessary to provide for a dealing with a part of the premises. We have the word "divide" in 7 Geo. 4, c. 29, s. 9: "It shall not be lawful . . . to devise such lands or any part thereof by his last will and testament, so as to portion or divide such lands to or among several persons." This plainly means a devise of the legal estate, as "assign" and "sublet" mean dispositions of the legal estate. Sect. 3 of the Act of 1881 deals with bequest. The effect is the claim to be accepted as tenant as in case of sale (which includes assignment).

The Act of 1881 gave to a yearly tenancy a wholly new character. It fastened the tenant on the landlord practically on the same terms as on a long lease. Did the Legislature by sects. 1, 2, and 3 of the Act intend to do more than put him on the footing of a tenant under a lease with a covenant against assigning part of the holding without the landlord's consent, and against assigning the whole save as provided by sect. 1; was not the

ruling principle still that the landlord should not have strangers forced on him as tenants against his will?

To my mind, the elaborate provisions in sects. 1 and 3 as to the assignee's or nominee's right to be accepted as tenant by the landlord, and the landlord's right to refuse to accept him as tenant, show that the old principle I have taken so much time to enforce was still the governing intention of the Legislature. The sale and implied prohibition of assignment in sect. 1 plainly indicate the same thing—(1) (6), the landlord may refuse to accept the purchaser as tenant; 1 (9) (*b*), the landlord shall not be obliged to accept the purchaser as tenant. Only a legal assignee could have any claim to be accepted as tenant.

An agreement to assign is not an assignment. An agreement to mortgage is not a mortgage. An agreement to sublet is not a subletting unless it is a legal lease. Is an agreement to divide a division?

There is a clear and plain construction of the clause, "shall not subdivide," viz., "shall not sever the tenancy." This construction carries out the scheme of sects. 1, 2, and 3 of the Act of 1881. It places the extended interest of the yearly tenant in the same position as that of a leaseholder, with covenants following these sections, and carries out the general policy of the law shown by the decisions and statutes, i.e., to protect the landlord from having an unwelcome tenant or tenants forced on him.

As to proof of the contract, it has been found by the jury, and for the reasons I have already stated I do not think the finding can be questioned in the present proceeding; however, I am of opinion that there is complete proof of part performance. I assume the contract valid, otherwise there is no case. The findings establish the fact of part performance; they are not questioned. Part performance was a principle of the law of evidence only recognized in the Court of Chancery. The only effect of the part performance is to admit oral evidence of the actual contract. It touches neither the validity of the contract nor its breach, nor its performance. It simply gets rid of the objection to evidence of the contract on the ground that only written evidence is admissible. Once that is done, part performance has no more to say to the case. The terms of the contract

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must be proved by the oral evidence. If it proves the contract, the case is then simply in the same position as if the contract had been in writing, and all questions as to its validity, &c., are to be decided in the same way. The part performance is part performance by the party seeking to enforce the contract, not, as would seem to be suggested in this case, part performance by the other party. His conscience is to be affected by his having allowed or induced the party seeking performance of the contract to do the acts of part performance. If he knows that he has no power to permit it, that he is acting unlawfully in so doing, I cannot see how it makes his conduct less unconscientious, and that is the only matter. The principle is thus stated by Lord Cranworth at p. 148, of *Caton* v. *Caton* (1): "The ground on which the Court holds that part performance takes a contract out of the purview of the Statute of Frauds is, that when one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, as, for instance, by taking possession of land and expending money in building or other like acts, then it would be fraud on the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed the person contracting with him to act and expend his money." Of course, "legal invalidity" here means invalidity under the Statute of Frauds. The law is well stated in Roscoe's Evidence, 18th ed., at p. 319. He states the rule almost in the words of Wigram V.-C. in *Dale* v. *Hamilton* (2). The Vice-Chancellor, having stated the principle, says, at p. 381:—"A common example is the delivery of possession. One man, without being amenable to the charge of trespass, is found in the possession of another man's land. Such a state of things is considered as showing unequivocally that some contract has taken place between the litigant parties; and it has therefore on that specific ground been admitted to be an act of part performance." This has often been referred to, but, as far as I know, never doubted. In the present case Gibson J. says, "His [the defendant's] possession was not trespassing but lawful," although he held the contract unlawful. The objection taken to the part performance in this case is that the giving of the possession by Peter to defendant was an unlawful act. If the agreement was lawful, it was possession under a lawful

(1) L. R. 1 Ch. App. 437. (2) 5 Hare, 381.

agreement. But it is settled that possession, even if given under an unlawful assignment or subletting, is valid and effective and lawful as possession (Cherry, pp. 47, 242). The cases cited in Cherry are conclusive as to this. I would particularly refer to *Ryan* v. *Byrne* (1) and *Meares* v. *Redmond* (2). Every fact necessary to establish part performance has been found by the jury.

Applying this, the Court had clear jurisdiction to declare a trust, and to protect the equitable right by injunction. Specific performance is the common instance on which the principle of part performance arises, but the basis of the principle, i.e., fraudulent use of the statute, applies equally to all cases in which equity would have had jurisdiction if the contract had been in writing. The negative proposition is that the absence of writing would not have given the Court of Chancery jurisdiction in a case in which it would not have had jurisdiction if the contract had been in writing (3). To confine the principle to cases of specific performance would be analogous to the apparent confinement of the principle of equitable assignment to cases of specific performance in *Holroyd* v. *Marshall* (4), with which I have so fully dealt.

As to finding No. 1, I am unable to agree with the Lord Chancellor in his view of the construction of this finding.

As to the meaning of "absolutely," I would refer to the judgment of James V.-C. in *Irvine* v. *Sullivan* (5), adopted by Lindley J. in *In re Williams* (6); also to the judgment of Lord Davey in *Comiskey* v. *Bowring Hanbury* (7). If a contract is made orally, the question of what the contract was is for the jury. If the verdict of the jury consists (as in this case) of written answers to written questions, the function of the Court is to construe them as they would construe any other document; see per Lord Atkinson in *Usher* v. *Wiltshire Brewery Co.* (8).

I further think that the evidence of defendant—"I was to be the owner, to have it for my property, and never to be disturbed out of it"—justified the finding, even if that question was open in the case.

(1) 17 I. L. T. R. 102.
(2) 4 L. R. Ir. 533.
(3) See Fry, Specific Perf., 297, 298.
(4) 10 H. L. Cas. 191, 211.
(5) L. R. 8 Eq. 673.
(6) [1897] 2 Ch., at p. 21.
(7) [1905] A. C., at pp. 89, 90.
(8) [1915] A. C., at p. 449.

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I must not be taken as dissenting from the view of O'Connor L.J. as to specific performance. In my opinion, however, it is unnecessary to decide the question, as the defendants' remedy in equity would be an action claiming—1, a declaration that the plaintiff here holds the lands in trust for them; 2, an injunction; 3, an order on plaintiff here to convey the legal estate to the defendants—a simple action by a cestui que trust under an express trust against the trustee who sought to evict him under the legal title. As to registration, I am of opinion that if the fiat has not been properly stated in the register, this Court can correct it or treat it as corrected. I give no opinion on the question of the Statute of Limitations.

I am of opinion that the judgment of the King's Bench Division should be reversed, and the judgment of Gordon J. restored.

O'CONNOR L.J.:—

Notwithstanding the insignificance of the plot in dispute, this is a very important case, raising some novel and difficult questions of wide application. The first question that arises is this: What was the exact nature of the contract entered into in 1902 between Peter O'Regan and Robert White? The contract has been found by the jury in the following terms:—"In the year 1902 did Peter O'Regan promise defendant Robert White that if he came back and managed his creamery, he would give him the plot of ground absolutely and assist him in building a shop upon it? Answer, 'Yes.'" The plaintiff contends that this was a contract to assign the plot to Robert White for Peter O'Regan's interest in the lands, which was a statutory tenancy. The defendants, on the other hand, contend that this was a contract to convey to Robert White in fee.

As I view the case, it is really immaterial, in the result, which of these constructions is the correct one.

If the contract is a contract to convey the fee, it is obviously a lawful contract. The fee could not be conveyed unless Peter O'Regan got it. Peter O'Regan could not get it unless from the landlord. Therefore, on this construction, all question as to the invalidity of the contract by reason of the parties not having the

landlord's consent disappears, inasmuch as the contract itself was for a thing the performance of which would take the case out of the statute altogether.

If I were obliged to say definitely whether the finding of the jury means, as the Lord Chancellor thinks, a contract to assign for all Peter O'Regan's interest, or, as Ronan L.J. thinks, a contract to convey the fee, I should probably hold that the contract was merely to assign for all Peter O'Regan's interest. The pleadings, the evidence, the relationship of the parties, and the nature of the case generally, all seem to me strongly to support that construction of the jury finding, though I may remark that, whatever interest Robert White was to get, he was to be under no liability for any rent or payment in the nature of rent to the landlord or to anyone else—he was to have the plot free. As I have indicated, and as will appear later on, it is, in my view, not material which view of the contract is taken. I shall deal with the case henceforward on the assumption (most favourable to the defendants) that the contract is one to assign the plot for Peter O'Regan's interest therein. This raises the net question: Is a contract by a statutory tenant to sell or assign part of his holding an illegal contract where the landlord's consent to such contract has not been obtained? Such a tenant is by statute forbidden to subdivide his holding without the landlord's consent. Is an executory contract to subdivide it—the contract being silent as to the landlord's consent—within the statutory prohibition?

Now, of course, a contract which expressly provided that the tenant should, without the landlord's consent, assign portion of the holding would be clearly bad. Such a contract would be a contract in express terms to do an illegal thing, and would, therefore, be itself illegal. It is, of course, unnecessary to say, on the other hand, that a contract to assign part of a holding with the landlord's consent would be clearly legal.

The question arises where the contract is silent as to obtaining the landlord's consent. Here we have a contract to do a thing which may be done in a lawful manner. True, it cannot be done in a lawful manner unless the licence or consent of a person, who is a stranger to the contract, is obtained. But a contract to do a thing which may be done in a lawful manner cannot be construed

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as a contract to do the thing in an unlawful manner, merely because the consent of a third party is required for the doing of it in a lawful manner.

On the question as to the proper legal inference to be drawn where a contract may be performed in a lawful manner, let me quote a very high authority, Lord Abinger C.B., who in *Lewis* v. *Davison* (1), at page 657, says: "I fully assent to the general proposition which has been urged, that an agreement to do an unlawful act cannot be supported by law. But it does not appear to me that that is necessarily the effect of the agreement in the present case; and when the act which is the subject of the contract may, according to the circumstances, be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act; the contrary is the proper inference." *Haines* v. *Busk* (2) is to the same effect, and particularly instructive in connexion with the present case. In that case it was held that it was no answer to an action by a broker for commission for procuring freight, that the charter-party procured was such that if the charterer failed to obtain certain licences, the voyage would be illegal, Gibbs C.J. (p. 527) remarking: "And if this agreement, such as it is, could have been legally performed by taking certain steps afterwards, the plaintiff is in that case entitled to recover a compensation for procuring the contract. Non constabat at the time when the plaintiff discharged his duty, that whatsoever was necessary to legalize the voyage would not be gotten" (and see also *Waugh* v. *Morris* (3)).

On the ground, therefore, that the contract as found by the jury was one that might have been performed in a legal manner, I am of opinion that the contract was a legal contract. To hold otherwise would lead to curious results. *A*, a statutory tenant, agrees to sell *B* a part of his holding. *A*, at the date of the agreement, has not the consent of the landlord, but he gets it the next day. Can *A* say that because he had not the consent of the landlord at the date of the agreement, he will not be held to his bargain? In such a case I would think it hardly arguable that the contract was not a legal contract. We must remember that the date to determine the legality of the contract is the day it was entered into; its legality cannot depend on matters subsequent—

(1) 4 M. & W. 654. (2) 5 Taunt. 521. (3) L. R. 8 Q. B. 202.

though, indeed, I hope to show that there was no illegality on the part of anybody throughout this transaction.

Before I pass from the question of the nature of the contract, I must say a word as to the obligation of Robert White in respect of the management of the creamery. The duration of that obligation is not found by the jury. It probably was as long as Peter O'Regan required. Be that as it may, it has been found that the obligation on Robert White's part has been performed, and if there is any ambiguity as to the duration of the obligation, we cannot allow the defendants to be prejudiced by it, for the performance by them has been found in terms which were not challenged by counsel for the plaintiffs. It also, as I think, follows from the finding of the jury that the obligation to convey arose only upon and subsequent to Robert White's performance of the obligation cast on him by the contract.

Now, the legality of a contract is one thing; its enforceability in an action for specific performance is another thing. What is to happen in an action brought against a statutory tenant to compel the specific performance by him of a contract to sell a portion of his holding? The statutory tenant is bound by such a contract; further, he is bound to take all possible steps to carry it out, including the exercise of reasonable diligence by him in attempting to obtain the landlord's consent. The plaintiff in such an action is, in my opinion, prima facie, entitled to his decree. That seems to me to follow from the reason of the thing, as well as from the case of *Leitch* v. *Simpson* (1), which is a direct authority on the point. Of course, if it appears—either at the trial or in the course of the subsequent proceedings—that, notwithstanding the efforts of the defendant, the consent of the landlord cannot be obtained, the decree will not be made or enforced, and the conduct of the parties will determine the question of costs. But that is because the defendant cannot carry out his contract; it is not because the contract is illegal. Every plaintiff in an action for specific performance has to face the possibility of his eventually being unable to obtain it, owing to the incapacity of the defendant, for one reason or another, to perform it.

(1) I. R. 5 Eq. 613.

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An instructive case on this subject is *Paxton* v. *Newton* (1). In that case the defendant agreed to make a lease to the plaintiff for twenty-one years of copyhold property, which, prima facie at any rate, could not be granted without the licence of the lord of the manor. Vice-Chancellor Stuart, in giving judgment for the plaintiff, said (p. 439): "This is a bill for the specific performance of an agreement for a term of twenty-one years. The conditions are defined; everything is certain. Nevertheless the right of the plaintiff is resisted by the defendant, because the property agreed to be let is copyhold; and there the case stops as to that part of the defence. He does not say that to grant a lease for twenty-one years will work a forfeiture by the custom of the manor, unless he has the lord's licence; nor does he say (if such were the custom) that he has applied to the lord for a licence to enable him honestly to perform his agreement. Generally, no doubt, a lease for twenty-one years cannot be granted of copyhold property; but here no evidence of the custom of the manor has been brought before me."

It is my opinion—and the judgment I have just cited shows—that where there is an agreement which is capable of being specifically enforced, the burden is on the defendant—who relies on an inability to perform, which he alleges it is beyond his power to remove—to prove that fact as a matter of defence. For these reasons I am of opinion that the contract in question was not only a legal contract, but was one which was, in its nature, capable of being specifically enforced.

The judgments in the Courts below have proceeded upon the basis that the contract in this case is an illegal contract. I am quite sure that the learned Judges could not have been unmindful of the principle of construction of a contract which may be carried out in a lawful manner, and enunciated by Lord Abinger in the passage I have quoted above. Accordingly, I am driven to the conclusion that the learned Judges really construed this contract as one by which Peter O'Regan agreed to sell and assign part of his holding to Robert White without the landlord's consent. My answer to that is that there is no finding of the jury to this effect; nor did plaintiff's counsel require any question to be put

(1) 2 Sm. & Giff. 437.

to them to test this issue. As the contract was not in writing, it may be that there was evidence deducible from all the circumstances, from which the jury might have inferred such a contract. I do not say that it is so. At any rate, in the absence of any finding of such a contract, I decline to draw any inference to the like effect. There is certainly nothing in the evidence, in my opinion, to coerce us to do so.

The contract, then, being lawful, I come to consider the question of the evidence of it. If the contract were in writing, I should not have had any difficulty in arriving at a conclusion on the case. But the circumstance that, the contract not being in writing, the defendants are obliged to have recourse to possession to let in evidence of it, has caused me much trouble; for it has been argued, with much force and plausibility, that the possession of the defendants is of such a nature that the Court will not look at it to supply the evidence required by the Statute of Frauds, and not forthcoming in the case. After much hesitation, I have at length arrived at a conclusion against the plaintiff, which I hesitate to call clear, having regard to the Lord Chancellor's view the other way.

The plaintiff's counsel put their case thus:—Robert White was let into possession; that possession itself would have been such as, apart from the statutory prohibition of subdivision, would have given him a good equitable title to the plot; the possession itself is, therefore, a subdivision within the statute, and, being illegal, cannot be made the foundation of a legal right. If the possession were a subdivision within the statute, and therefore illegal, I think that argument would be right. But I do not agree that the possession is such a subdivision.

The position of a purchaser who has been let into possession is well settled. I deem it necessary to cite only one authority on this point. Parke B., in *Doe d. Gray* v. *Stanion* (1), at p. 700, says:—"If there be an agreement to purchase, and the intended purchaser is *thereupon let into possession*, such possession is lawful and amounts at law, strictly speaking, to a bare tenancy at will (*Right d. Lewis* v. *Beard*) (2). It is not, however, the *agreement*, but the letting into possession, that creates such tenancy; for the

(1) 1 M. & W. 695. (2) 13 East, 210.

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person suffered so to occupy cannot, on the one hand, be considered as a *trespasser* when he enters; and, on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law."

It will be observed that the position of a person who has been let into possession is twofold. First, he is in possession by leave and licence of his vendor; this possession is a fact, and circumstance, in a sense, dehors the agreement, for it is not a necessary consequence of it, though, of course, it is a necessary consequence of the completion of the agreement by the conveyance. This possession is, at law, a mere tenancy at will; the purchaser can be called upon by his vendor to leave at any moment. Second, the purchaser has the agreement which, prima facie, he can specifically enforce. If he is in a position to enforce it, he is in a position, on equitable grounds, to resist any attempt to eject him. But if he is not in a position to enforce it—e.g. by reason of the vendor's inability to make title—he can be put out on a moment's notice. That is his position, which it is necessary clearly to grasp if one is to understand what I conceive to be the fallacy of the plaintiff's contention on this head.

Now, any legal possession is sufficient to let in verbal proof of the contract, for the fact of possession, and not the quantum of interest that supports it, is the basis of the doctrine of part performance with which I am now dealing. In *Maddison* v. *Alderson* (1) Lord Selborne quotes with approval the judgment of Sir T. Plumer in *Morphett* v. *Jones* (2): "The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure." In *Ungley* v. *Ungley* (3) Sir George Jessel M.R. says: "The reason is that possession by a stranger is evidence that there was some contract." Therefore, it is evident that the possession in this case lets in verbal proof of the contract, unless that possession was itself illegal by reason of the contract; in order words, unless the possession was a sub-division of the holding.

(1) 8 A. C., at p. 479. (2) 1 Sw. 181. (3) 5 C. D. 887, at p. 890.

I do not think it can seriously be contended that to allow a person into possession merely during pleasure can be regarded as a sub-division. A person so let into possession has no title, strictly so called, to the possession at all. But, says the plaintiff, that is not the case here; for here there is possession plus an equitable title to retain it, and that is a sub-division. Ronan L.J. is of opinion that no merely equitable assignment can amount to a sub-division. With his elaborate judgment on this point I am disposed to agree. I answer the argument for the plaintiff in my own fashion thus—first, the possession is lawful; the contract is lawful. It would be a strange result if, by attributing a lawful possession to a lawful contract, the possession becomes unlawful; second, it is not correct to say that a good equitable title necessarily appears from linking up the possession with the contract. True, if at any time after Robert White had performed his obligation, the landlord's consent had been obtained, Robert White could have sued for specific performance, and, therefore, could have successfully defended ejectment proceedings. In that event, cadit quaestio, for the hypothesis supposes the landlord's consent. If, on the other hand, no such consent had been obtained, his equitable right to possession, based upon his right to specific performance, would have disappeared—not by any illegality in the contract, but by reason of the vendor's inability to carry it out, and with it would have gone all his claim to resist the ejectment—for both at law and at equity he would have been a mere tenant at will. Therefore, I think, we can regard this possession as evidence of a perfectly lawful contract, which the Court will uphold and enforce, unless there is anything else in the case to prevent it.

It has been said that at no time before the purchase of the lands could Robert, even though he had performed his obligation, have obtained a decree of specific performance. I am not sure that this is so. It may be that the landlord's consent could have been had for the asking; as I have already said, I am of opinion Peter O'Regan would have been bound to ask for it, and to use reasonable efforts to procure it. But, even if it were the fact that the landlord's consent was not available, that proves nothing. If a man enters into a contract which for some reason cannot be carried

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out, it will not be specifically enforced against him; if, however, he acquires the power to carry it out later, it may. The case of *Carne* v. *Mitchell* (1), referred to by Ronan L.J., is conclusive on this point; and the case of *Moynehan* v. *Hickey* (2), cited in the argument, is an authority in the same direction.

A further point has been raised by the plaintiff, that inasmuch as the contract found by the jury included an obligation on the part of Robert White to manage the creamery—an obligation in its nature incapable of specific performance—the obligation on the other side to make over the land was equally incapable of specific performance, and that, therefore, the defendants, having no equitable right to have the lands conveyed to them, the ejectment must issue against them.

The general principle as to the necessity for mutuality in a suit for specific performance is laid down in a text-book of great authority, thus:—"A contract to be specifically enforced by the Court must, as a general rule, be mutual—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them" (Fry on Specific Performance, 5th ed., p. 231). If the words "as a general rule" be taken as equivalent to "subject to the exceptions hereinafter set forth," and which exceptions I need not further refer to, as they throw no light upon this case, I think this statement requires some modification.

The foundation of the doctrine of specific performance is thus stated by Farwell J., in *Hexter* v. *Pearce* (3):—"To my mind the whole doctrine of specific performance rests on the ground that a man is entitled in equity to have in specie the specific article for which he has contracted, and is not bound to take damages instead." One of the limitations to the doctrine is that equity will not aid one party to an agreement to have in specie that for which he bargained unless it can likewise aid (if necessary) the other party to have in specie that for which he bargained. A good example of that is the case of *Blackett* v. *Bates* (4). In that case an arbitrator made an award that the defendant should execute to the plaintiff a lease of the right to use such part of a certain

(1) 15 L. J. Ch. 287.
(2) 10 I. L. T. R. 98.
(3) [1900] 1 Ch., at p. 346.
(4) L. R. 1 Ch. App. 117

railway made by the plaintiff as was upon the land of the defendant, and that the defendant should have a right of running carriages over the whole line on certain terms, and might require the plaintiff to supply engine power, and that the plaintiff should during the term keep the whole railway in good repair. It was held that specific performance of the award could not be decreed, inasmuch as the provisions in favour of the defendant could not be enforced at once, but gave the defendant a right to have certain duties continuously performed by the plaintiff for a number of years, and the Court could not undertake to see to such performance. Lord Cranworth said (at p. 124):—"The rights of the parties in respect of specific performance are the same as if the award had been simply an agreement between them. Had it been an agreement, would there have been a case for specific performance? I think not, and for this short and simple reason—that the Court does not grant specific performance unless it can give full relief to both parties. Here the plaintiff gets at once what he seeks—the lease; but the defendant cannot get what he is entitled to, for his right is not a right to something which can be performed at once, but a right to enforce the performance by the plaintiff of daily duties during the whole term of the lease. The Court has no means of enforcing the performance of these duties."

Now, it will be observed that in that case, and, I think, in all the other cases in which relief has been refused on the ground of want of mutuality, the obligation on the plaintiff under the contract, as well as the obligation of the defendant under the contract, not having been performed, the mutual obligations were, wholly or partially, in fieri.

Generally speaking, at any rate, it would not be even-handed justice to compel specific performance against the one party, where the same remedy would not be available against the other party in respect of matters to be by him performed under the contract. But has the reason for this limitation on the powers of the Court any application where the party seeking specific performance has done everything by him to be done under the contract? Take a very simple case: *A* says to *B*, "If you agree to go to India and transact such and such a business there, I will, on your completing your agreement,

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convey to you my lands of Blackacre." *B*, who would not have undertaken the business at all but for the tempting offer of Blackacre, accepts, goes to India, transacts the business he engages for, and on his return demands Blackacre from *A*. Shall he not have it? If not, why not? Is it on the ground of want of mutuality? What mutuality? The contract itself provided that the obligation on *A* should never arise until *B* had entirely performed his obligation; in other words, the contract negatived all idea of mutuality at the time *A*'s obligation to convey arose. In such a case, in my opinion, the defence as to the want of mutuality fails. I am confirmed in this view by the circumstance that in *Maddison* v. *Alderson* (1), which to all intents and purposes was a suit for specific performance, and the contract in which did not in essentials vary from the illustration I have given, the elaborate discussion and judgments as to part performance would have been wholly unnecessary if the point as to mutuality were a good point in a case of the kind.

The illustration I have put is one in which the obligation sought to be enforced arises only and is dependent upon the other party's completion of his obligation. There are other cases in which the obligations on both sides are concurrent—that is to say, they arise immediately on the execution of the contract. In such cases it may in future be argued that the complete performance by the plaintiff of an obligation in its nature not capable of being specifically enforced gives him the right to specific performance as against the defendant of an obligation in its nature capable of being specifically enforced. I express no final opinion as to that; but I can imagine cases where, the plaintiff having, at the time of action brought, performed all his obligations under the contract, it would be a hardship to refuse him specific performance merely on the ground that at the date of the contract the plaintiff's obligation could not have been specifically enforced against him. I should also like to point out that a case, relevant on this point, and cited in Fry (at p. 235) of *Hope* v. *Hope* (2), does not seem to me an authority for the proposition in the text. That proposition is—"From the time of the execution of the contract, being the time to judge of its mutuality, it further follows that the subsequent

(1) 8 A. C. 467. (2) 8 De G. M. & G. 731, 746.

performance by one party of terms which could not have been enforced by the other will not prevent the objection which would arise from the presence of such terms." In my opinion, the passage from Turner L.J.'s judgment does not bear out that proposition. This is the passage:—"Lastly, it was urged on the plaintiff's behalf that whatever objection there might have been to this agreement in its inception, what remains to be performed is legal and unobjectionable; but to hold that an agreement so objectionable as that this Court would not perform it can be rendered capable of performance by the objectionable parts of it having been carried into execution, is a doctrine to which I cannot assent." That seems to me tantamount to saying that equity will not aid an agreement which, in part at any rate, is contra bonos mores. I have said enough to show that the doctrine of mutuality as generally stated needs some modification. On the extent of that modification I give no opinion save so far as is necessary for this case; but it seems to me that there is a great deal of force in the observations of the learned writer in 19 Law Quarterly Review, July, 1903, at p. 341 (cited in Fry, p. 235, *n.* 2), that the exceptions to the doctrine of mutuality "are all referable to one and the same general principle, viz., that the defence of want of mutuality will not avail to prevent the Court from exercising its beneficial jurisdiction where the contract can be properly enforced without any possible injustice to the defendant, provided a corresponding equitable remedy" (he might have said "if necessary") "becomes available against the plaintiff on or before his institution of the action."

I come back now to the contract as found in this case. I have already expressed the opinion that the obligation to convey arose only upon, and subsequently to, Robert White's full and complete performance of his obligation. Such performance has been found by the jury; and on that appearing, Robert White became entitled to claim specific performance against any person bound by the contract.

The last point upon which plaintiff's counsel have relied is that, assuming an enforceable contract to sell the plot binding on Peter O'Regan, it is not binding on the plaintiff as Peter O'Regan's successor in title. I think that the possession of the Whites was

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notice of the contract, for possession, generally speaking at all events, is constructive notice to a purchaser of the title of the possessor. The contract was, therefore, binding on Timothy O'Regan, and is binding on the plaintiff. And, in my opinion, the acquisition of the fee, or the registration of the title under the Local Registration of Title (Ireland) Act, 1891, does not help the plaintiff. The fee was acquired, and the registration effected, subject to all rights and equities previously binding the tenant's interest, as the vesting order and the fiat show. I agree with the judgment of Gibson J. in *Reddock* v. *Wright* (1), where he held that a vesting order obtained by a purchaser under the Land Purchase Acts cannot be relied on by him for the purpose of defeating his own contract or grant. The case of *Tench* v. *Molyneux* (2), decided in this Court, is a conclusive authority on the question of the effect of the registration of the title. I am, therefore, against the plaintiff on all points, and agree with Ronan L.J. that this appeal should be allowed with costs, and costs of the argument in the King's Bench Division, and of the trial.

The defendants, by way of alternative defence, raised the question of the Statute of Limitations. Had that been their sole defence, I should have come to the conclusion that the judgment against them should be affirmed, and, perhaps, I should give my reasons for my opinion.

The action is brought by a fee simple owner to recover possession. True, the defendants had been in possession for upwards of twelve years before action brought. But they had not been in possession for twelve years when the fee was acquired; nor have they been in possession for twelve years since the fee was acquired. Now if this were a case of an ordinary termor, there would, I think, be no doubt about it. The ordinary time within which a person seeking to recover land must proceed, if he wishes to succeed, is twelve years from the time of the accruing of the cause of action (Real Property Act of 1874, s. 1). By sect. 3 of the Real Property Limitation Act of 1833 the right is deemed to have accrued as follows:—In the case of an estate in possession, from a dispossession in respect of the estate or interest claimed; in the case

(1) 28 I. L. T. R. 146. (2) 48 I. L. T. R. 48.

of a future estate or interest, from the time the estate or interest becomes an estate or interest in possession. On the construction of the latter section by itself, it is clear that if the same person (*a*) had an estate or interest in possession, and (*b*) was entitled to a future estate or reversion, even though his estate or interest in possession was barred by dispossession for the statutory period, this would not affect his future estate, and he would have a fresh start in the reckoning of the time against him from the date when the future estate came into possession. Sect. 20 of the Act of 1833, however, provides—subject to an exception which is not material—that when the right to an estate or interest in possession is barred, the right of the same person to future estates or interests in reversion is barred. It is obvious from this section that anything short of a barring of the estate or interest in possession (for example, possession for 11 years and 364 days) has no effect whatever on the future estate or reversion. In the present case no title by virtue of the statute had been acquired when the fee-simple was vested, and accordingly, in my view, the statute ran afresh from the date of such vesting. Serjeant Sullivan says, however, that this is not the case of an ordinary termor acquiring the fee. He relies on sect. 8 of the Purchase of Land (Ireland) Act of 1885, which provides that the interest vested in the tenant-purchaser shall be deemed to be a graft upon the previous interest of the tenant in the holding, and be subject to any rights or equities arising from its being such a graft. But when this contention is examined, it seems to me to amount to an argument that in the case of a purchase of land in Ireland by an occupying tenant there is a notional continuance of the terms of tenancy. I cannot agree. The term or tenancy is gone for ever and aye. True, the rights attaching to it are preserved; but here the defendants had no such rights, as their title under the Statute of Limitations had not matured. There is nothing in the language of sect. 8 to warrant the idea of its being meant to give an opportunity of crystallizing possession not giving a right, into a right.

Solicitors for the appellants: *Wynne and Wynne.*
Solicitor for the respondent: *J. O'Leary.*

C. L.

K. B. Div.
1919.
June 18.

M'MORROW *v.* LAYDEN AND OTHERS (1).

Negligence—Quarry—Absence of fence—Duty to fence—Continuing liability.

The plaintiff was owner and occupier of the surface of certain lands on which there was an unfenced quarry, the mining rights in which were leased to the predecessor in title of the defendants. These rights passed by will to the defendants, who paid the rent reserved by the lease, but did not work the mine, and left it in the unfenced condition in which they found it. One of the plaintiff's bullocks fell into the quarry and was killed.

Held, that the plaintiff was entitled to recover damages from the defendants for the loss of his bullock, there being a continuing liability on the part of the defendants to keep the quarry so as not to be a danger and a nuisance to their neighbour.

CASE STATED by the Right Hon. Mr. Justice Gordon on the hearing of a civil bill appeal in the county of Leitrim at the Spring Assizes, 1919.

The facts appear sufficiently from the judgment.

Price K.C. and *Geoghegan*, for the defendants:—

Any breach of duty by Michael Layden, senior, was in enlarging the quarry without fencing it, thereby making it dangerous. The defendants having in fact done nothing on the plaintiff's lands or to the quarry or mine were not liable in tort, nor for any breach of duty either by Michael Layden, senior, or themselves.

The question for the determination of the Court is whether upon the facts the defendants are liable as successors in title to the lessee's interest for having and keeping the quarry in a dangerous condition. We submit they are not.

Fetherstonhaugh K.C. and *A. H. Webb*, for the plaintiff:—

The tort or breach of duty by Michael Layden, senior, in not fencing the quarry was a continuing one, and the defendants as successors in title to his mining rights were guilty of a breach

(1) Before MOLONY C.J., and KENNY and MOORE JJ.

of duty in keeping the quarry unfenced and in a dangerous condition. There is a legal obligation to discontinue a trespass, and to remove a nuisance.

Authorities cited and discussed: *Sybray* v. *White* (1); *Williams* v. *Grovcott* (2); *Hawken* v. *Sherer and another* (3); *Greenwell* v. *Low Beechburn Coal Co.* (4); *Hall* v. *Duke of Norfolk* (5); *Clarke* v. *The Midland Great Western Railway Co.* (6).

The judgment of the Court was delivered by MOLONY C.J.:—

In this case the plaintiff originally brought a civil bill against John Layden and others, claiming £17 damages "for that Michael Layden, senior, during his lifetime entered into an agreement with the plaintiff that he would erect and maintain a suitable protection fence around a quarry on the plaintiff's lands in Tullymurray in the said division and county, yet, contrary to said agreement, the said fence has not been properly erected and maintained, in consequence of which the plaintiff's bullock on the 16th August, 1918, fell into said quarry and was killed, to the plaintiff's loss in the said amount. The defendants are sued as executors de son tort or otherwise of the said Michael Layden, senior, deceased." On the cause of action thus stated in the civil bill the plaintiff did not succeed because it was found by the Judge on the hearing of the appeal at the assizes that there was no agreement which could be enforced against the defendants. However, Mr. Fetherstonhaugh at the hearing of the appeal got leave to amend the civil bill by adding the following claim:— "Alternatively for that the defendants as executors and legatees of Michael Layden, deceased, are possessed of the minerals and right of mining under tenancy from George Marsham beneath the surface of the said lands of Tullymurray, held by plaintiff formerly as tenant to George Marsham, and now as purchaser under the Land Purchase Acts, and the defendants as such owners of the said rights have and keep open a certain quarry surrounded by plaintiff's lands on which he keeps cattle

(1) 1 M. & W. 435.
(2) 4 B. & S. 149.
(3) 56 L. J. N. S. 284.
(4) [1897] 2 Q. B. 165.
(5) [1900] 2 Ch. 493.
(6) [1895] 2 I. R. 294.

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to graze, and which if unfenced was dangerous to plaintiff's cattle, and defendants neglected and omitted to fence said quarry so as to prevent plaintiff's cattle falling into the quarry, whereby a bullock, plaintiff's property, fell into said quarry and was killed, to the plaintiff's loss in the said sum." It thus appears that the claim upon which the case was fought and the decision given was a claim that there was a quarry on these lands which was in itself dangerous unless certain precautions in the nature of proper fencing were taken. These precautions, it was alleged, were not taken, and in consequence of the failure to take them the animal fell into the quarry and was killed.

That at once raises the question as to whether the defendants as successors in title of Michael Layden, deceased, were under an obligation to fence and maintain the fencing of that quarry so as not to be a source of danger and nuisance to the plaintiff.

It was proved at the hearing that the plaintiff had been for many years prior to 1899 tenant of these lands, which he had now purchased under the Land Purchase Acts. It was proved that on these lands there were a shaft of a coal mine and a quarry connected with this shaft, and that the mine and quarry had been worked by Michael Layden, senior, for many years under lease from the landlord of the plaintiff, granted by George Marsham to Michael Layden. That lease is incorporated in the case stated, and is for a term of twenty-one years from the 24th March, 1899. It is a lease of certain beds, veins, and seams of coal; and it gave the lessee full and exclusive liberty and licence to work and carry away for his own use all coal there found, he paying a yearly rent of £20, and a rent of 6*d.* per ton on all coal taken in excess of 1,500 tons per annum.

It is admitted that there were certain alterations made by Michael Layden, senior, who was working the mine in the year 1897, and that he enlarged the quarry, and in consequence of this enlargement it is alleged that the quarry became and still is a danger to the plaintiff's cattle.

Michael Layden died on the 25th November, 1916, and the defendants have succeeded to his rights in the lease of 1899 under a provision in his will by which he left all his interest in the mine and quarry to his sons, and appointed two executors.

It is found by the learned Judge, first, that the quarry was dangerous to cattle owing to its not being fenced, and that it was, because of this the plaintiff's bullock was killed; second, that Michael Layden, having by enlarging the quarry made it dangerous to plaintiff's cattle, was bound to fence it in such a way as to prevent it from being dangerous. So far as these findings of the learned Judge are concerned, they are acquiesced in by both parties. The argument of the plaintiff's counsel, however, is that the defendants, having succeeded to the interest of Michael Layden in a quarry which at the time they succeeded was not properly fenced, and which was then a danger and a nuisance, and they having allowed it to remain in that unfenced and dangerous condition, in consequence of which the plaintiff's bullock was killed, are liable to the plaintiff for their breach of duty to him. On the other hand, it is said that, although there might have been a right of action against Michael Layden in 1897, that right does not exist now, and that the defendants are not liable.

In cases of persons entitled to dig for minerals in respect of, 1, mine-shafts and the working of mine-shafts, and 2, as regards the legal effect of subsidence, there have been a number of decisions to which I will refer in a moment.

The plaintiff relies on the case of *Williams* v. *Grovcott* (1), and also on *Hawken* v. *Shearer and Another* (2). *Williams* v. *Grovcott* (1) decides that where a person is entitled to the minerals under the land of another, with licence to make a mine-shaft opening into it, he is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent its being a source of danger to his cattle which may be upon it, and is liable to an action for injury accruing to those cattle for want of such fencing. It is unnecessary to examine the facts of that case. The principle is clearly stated by Cockburn C.J. as follows:—"On the one hand, the owner of the surface may say to the owner of the minerals, 'You have licence given you to dig this shaft, still it is incumbent on you to fence it.' On the other hand, the man who sinks the

(1) 4 B. & S. 149. (2) 56 L. J. N. S. 284.

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shaft may say, 'In making this shaft I did no more than I was given a right to do; and if, in consequence of that, dangerous consequences are likely to arise to your cattle on the surface, it is for you to guard against them.' And the question is, whether the man sinking the shaft is entitled to make that answer, or is he under an implied obligation to fence the shaft? I am of opinion that it is more reasonable to expect that the man whose act produces the danger should do all that is reasonably necessary to prevent injurious consequences to the owner of the surface soil, who does not know that a shaft will be sunk, or, if so, when or where it will be sunk." Now, that principle has been followed ever since. A similar case, *Hawken* v. *Shearer and Another* (1), came before Mathew J., a great authority in this class of case, and he deals with the argument before him as follows:—"The scope of the arguments on either side in this case amounts to this, that we are presented with two well-known legal maxims: the one, Sic utere tuo ut alienum non laedas; the other, Volenti non fit injuria. On the one hand, we have it that here there is an obligation upon the quarry-owner to fence in the quarry; and upon the other that no such obligation exists, and that it is the duty of the owner of the land to protect his cattle. The authority on the subject is certainly scant, but I am inclined to think it sufficient. It appears to me that the true principle has been well laid down in *Williams* v. *Grovcott* (2), which is this, that where an alteration has been made in the normal state of things, calculated to cause injury to a neighbour, an obligation is cast upon the person who makes such an alteration to protect his neighbour from injury—in this case to place a fence so as to prevent cattle from falling into the quarry."

It is unnecessary for me to do more in the present case than to refer in passing to the case of *Clarke* v. *The Midland Great Western Railway Company* (3), where the whole subject of continuing damage was considered.

Counsel have referred us to cases of subsidence, and the first case relied on was the case of *Greenwell* v. *Low Beechburn Coal Company* (4).

(1) 56 L. J. N. S. 284.
(2) 4 B. & S. 149.
(3) [1895] 2 I. R. 294.
(4) [1897] 2 Q. B. 165.

That was a decision of Bruce J. on the trial of an action to recover damages for injury done to the surface of the land by subsidence caused by working mines. In a considered judgment Bruce J. held that where the buildings of the plaintiffs erected more than twenty years before action, on land, the mines under which were worked by the defendants under a lease, were injured during the currency of the lease, and within six years before action, by subsidence caused, not by the acts of the defendants, but by the acts of their predecessor in title, done prior to the date of the lease, the defendants were not liable. The same principle was followed in the case of *Hall* v. *Duke of Norfolk* (1). In that case Kekewich J. cites with approval, at page 499, Bruce J. as follows:—"Until the actual subsidence happened, there was nothing unlawful in the state in which the land was left. At no moment prior to the subsidence can it be said that there was any duty upon anyone to provide artificial support; and, therefore, it seems to me that it cannot be said that the defendants are guilty of a default of duty in allowing a state of things to continue which was a perfectly lawful state of things." In that sentence the distinction between the two classes of cases is tersely put. In the one case, until actual subsidence, there is nothing unlawful in the way the lands are left; whilst, in the other case, there is something unlawful unless proper precautions are taken to protect a neighbour, and that is the distinction I see between a case of subsidence and this case, where there is on the lands an unfenced and dangerous opening. The defendants succeeded to the rights and liabilities in respect of this unfenced opening, and there is clearly a continuing obligation on them to keep it so as not to be a nuisance to their neighbour. The question put must be answered in the affirmative.

Solicitor for the plaintiff: *Patrick O'Flynn.*
Solicitor for the defendants: *James A. Kiernan.*

H. J. M'C.

(1) [1900] 2 Ch. 493.

K. B. Div. 1919.

June 13.
July 2.

CAROLINE MARGARET BARNARD, PLAINTIFF; LOUISA BIRCH, DEFENDANT.

Probate—Nuncupative will—Captain of steamer—Document written on shore between sailings—Wills Act (1 *Vict. c.* 26), *sect.* 11—"*Mariner or seaman being at sea.*"

The deceased was a captain in the mail service, and commanded the s.s. "Leinster" during its cross-Channel voyages between Holyhead and Kingstown. He was actually at sea for the time each day spent in transit. He was on shore for the remainder of each day. He had a house at Holyhead where he and his wife and family lived. His testamentary disposition was contained in a document purporting to be a will which he signed at his house at Holyhead between voyages. The deceased was drowned when the "Leinster" was sunk.

Held, that the deceased was "a seaman," but was not "a seaman being at sea" within the meaning of sect. 11 of the Wills Act (1 Vict. c. 26), when he signed the said document purporting to be his will.

This was an action by Caroline Margaret Barnard, of 26 Longford Terrace, Monkstown, county Dublin, who claimed to be executrix of the last will, dated 14th December, 1917, of William Birch, late of The Sycamores, Gors Avenue, Holyhead, master mariner, deceased, who died on the 10th October, 1918, and to have the said will established.

The deceased was captain in the mail service, and as such was bound to take any vessel he was ordered to take. He was specially attached to the "Leinster," and commanded it on cross-Channel voyages from Holyhead and Kingstown. He was actually at sea for the time each day occupied in the transit. He was on shore for the remainder of each day. He had a house at Holyhead. His wife and some of his family lived with him. He had ten children. The "Leinster" was occasionally laid up.

On the 17th of November, 1917, Captain Birch sailed from Kingstown to Holyhead. The captain went home, and remained at home till the 15th December, when he resumed duty, and sailed to Kingstown. He remained in the service of the company all the time.

In his own house after breakfast on the 14th of December the deceased came into the breakfast-room, where his daughters were sitting, about ten o'clock in the day, and in these circumstances the will was signed. He either had got instructions, or he knew that in the ordinary course of his employment he would resume duty on the 15th of December.

Denning K.C. (with him *Newett*), for the plaintiff:—

We submit that the deceased was a "seaman being at sea" within the meaning of sect. 11 of the Wills Act (1 Vict. c. 26) when he made his will. He was then actually in the service of the steamship company, and only on shore between voyages. The fact that he was temporarily ashore does not prevent him from being "a seaman being at sea": *Re Hale* (1); *Stanley, deceased* (2); *E. J. Lay, deceased* (3); *Re Hiscock* (4).

Hanna K.C. and *Chadwick*, for the defendant:—

This is not a case of a privileged will. We admit that Captain Birch was a mariner or seaman, but he was not "at sea" at the date of the alleged will. He was then living at home, his ship being in reserve. He was in no sense inops consilii. Madden J.'s decision in *Goods of Hale* (1) was an ex parte decision, not binding in this action, and we submit it should not be followed. The learned Judge held that there was no analogy between a seaman who had taken some step to proceed to sea and a soldier in expeditione. It, however, required a statute—the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58)—to place members of His Majesty's naval and marine forces in the same position as soldiers with regard to nuncupatory wills, and ordinary seamen were left as before. In *Yates' Estate* (5) the will of the testator, a lieutenant in the Royal Navy, would not have been upheld but for the later Act, although he had actually left his home to join his ship. The judgment of Coleridge J., at p. 94, *Estate of Anderson* (6), is in favour of our contention.

(1) [1915] 2 I. R. 362.
(2) 32 T. L. R. 643.
(3) 2 Curteis, 375.
(4) [1901] P. D. 82.
(5) [1919] P. D. 93.
(6) [1916] P. D. 49.

K. B. Div. 1919.

BARNARD *v.* BIRCH.

July 2.

DODD J.:—

This action is brought to establish the will, dated the 14th of December, 1917, of William Birch, late of The Sycamores, Gors Avenue, Holyhead, master mariner, who lost his life in the "Leinster" on 10th of October, 1918.

The statement of claim relies on a duly executed will. The defence is confined to an averment that the will was not duly executed according to the provisions of the statute 1 Vict. c. 26. The reply pleads that at the time of the execution of the said will William Birch was a mariner or seaman being at sea within the meaning of sect. 11 of that statute.

The questions submitted for my adjudication are two:— 1. Whether the paper writing was duly executed pursuant to the provisions of the statute, and 2, whether at the date of the execution the deceased was a mariner or seaman being at sea within the meaning of section 11, and "such other questions as the Judge shall think fit."

The will is dated as of The Sycamores, Gors Avenue, Holyhead, the residence of the deceased, where he lived with his wife and family, and purports to have been signed by him in the presence of his daughters, Irene Birch and Rita Birch. They were examined before me, and they said their father did not sign it in their presence. After breakfast he came to them, and asked them to sign. The writing was covered from sight. After they had signed it they asked him what they had signed. He said it was a will. Mr. Denning but faintly contended that this was a good execution; but he said the will did not need attestation, as Captain Birch was at the time "a seaman at sea." The will was not only an unnatural will, but it was a cruel thing to get his daughters to purport to attest a will that was an insult to the family with whom he was living in friendly relations. Some suggestion was offered as to friction between him and his wife. This she denied. The property was substantially left to a lady, the plaintiff, who was not connected with the deceased. Mrs. Birch indeed, suggested he never meant it as his will. He only wrote it to please the lady. He posted it to Miss Barnard without a covering letter.

The document itself is in his handwriting, and is in words and figures as follow:—

THE SYCAMORES,
GORS AVENUE, HOLYHEAD,
December 14*th*, 1917.

This is my last will and I cancel all other wills and codicils. To my wife Louisa Birch, I give my shares (300) in Pure Jamaica Rum, Ltd., also my shares in The Electric Peat Coal Co., and the sum of £5 (five) from cash in bank. To my son William's wife Mary I give and bequeath all my furniture, pictures, and books and piano. To Caroline Margaret Barnard, now living at 26 Longford Terrace, Monkstown, Dublin, I give and devise my holding in War Loan £500, also my shares in the City of Dublin Steam Packet Co. £300, also my shares (400) in the Continuous Reaction Co., also my shares (25) in the Triplex Safety Glass Co., also my holding (100) shares in the Cornish Wolfram Mines, Ltd., and to my son Charles I leave all cash remaining in the bank after all debts have been paid, the said cash to be held in trust for him until he is twenty-one years of age, by the above Caroline Margaret Barnard who I make my sole executor, and for acting as such I leave her a further 25 shares in The Triplex Safety Glass Co. and my 50 shares in the "Renew Electric Lamp Co."

Signed,
WILLIAM BIRCH.

In the presence of and each other
IRENE BIRCH.
RITA BIRCH.

This fourteenth day of December, 1917.

One would infer that the document was sent to one to whom some intimation had been given of the testator's wishes as regards the document. One rather hopes that there may have been some verbal trust. The scripts lodged do not disclose any previous testamentary disposition. The shares left to his wife are said to be valueless, the residue to his son, a lad of sixteen, is the residue in bank after paying debts. I intimated that according to the authorities the intention of the person making an unattested will was of moment. It was open to the defendant to subpoena the lady, but she did not subpoena her. I could not accept a surmise that the deceased, knowing as it appeared from the will itself that two attesting witnesses were necessary, deliberately rendered it void, by having an informal attestation. Nor could I accept as a mere conjecture the suggestion of the widow that he did not mean it to be his last will—a suggestion sought to be carried out by the evidence of his daughters that he said "*a* will"

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instead of "my will." The document in the handwriting of the deceased declaring it to be his last will was conclusive. Mr. Denning so urged, and in the absence of anything to contradict it, I am obliged to take the intention from the document. So the only question I have to decide is, was Captain Birch "a seaman being at sea" when he signed this document? The section exempts from the requisites for formal execution "wills made by any soldier being in actual military service, or by any mariner or seaman being at sea."

It is said there are judicial decisions that control my judgment. Mr. Justice Madden has given a considered judgment in *The Goods of Sarah Hale* (1). The deceased in that case was a lady typist in the employment of the Cunard Steamship Company as a typist on the vessels of the company sailing between Liverpool and New York. She wrote some letters which were testamentary just as she was starting. The learned Judge in a luminous judgment decided she was a seaman, and a seaman preparing for a voyage, and that she was a seaman being at sea.

Bargrave Deane J. in *Anderson's Estate* (2) decided that a man who was called up on the Naval Reserve, but had not actually been made a sailor, was not a seaman being at sea. The two cases are said to be in conflict. I do not think they are, in principle. Indeed in a subsequent case, *Ada Stanley* (3), Bargrave Deane J. adopts the principle of Mr. Justice Madden's decision. The lady there was a nurse under the Queen Alexandra Imperial Nursing Service. The letter was written during an interval of leave on shore in this country, but after the writer had received orders to re-embark. The Judge, applying the principle of Mr. Justice Madden's judgment, held that she was a seaman being at sea. To what extent am I bound? There are four points with which I must deal specially, but before opening them I have to consider to what extent I am bound by previous decisions.

So far as the principles governing the case are concerned, I am bound by previous authorities. In *Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ltd.* (4), Lord Haldane said: "To follow previous authorities, so far as they lay down principles, is

(1) [1915] 2 I. R. 362.
(2) [1916] P. D., at p. 49.
(3) [1916] P. D., at p. 192.
(4) [1914] A. C., at p. 40.

essential if the law is to be preserved from becoming unsettled and vague. In this respect the previous decisions of a Court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in systems where the paramount authority is that of a code. But when a previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognized by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but can rarely yield authoritative guidance." As a protest against being bound by previous decisions as to facts, I cite this.

The legal principles underlying the case have been applied to soldiers on the one hand, and to sailors on the other. As regards the first class, the rule was laid down by my brother Boyd in *In the Goods of Godley* (1), in which it was decided that "When confidential instructions are issued by the War Office to the effect that an order for mobilization may in certain contingencies shortly be issued, an officer to whom such instructions are communicated, and whose regiment was designated for inclusion in any force that might in such contingencies be mobilized, and which was in fact included in a force subsequently mobilized, will be held to have been 'in actual military service' as from the date on which such instructions have been communicated to him." The Judge's order is given in the report, but not his judgment. In order to come within the principle of law involved, it is not necessary to be in actual charge of firearms in order to be regarded as "in actual military service." In another case, *In the Goods of Hiscock* (2), Sir Francis Jeune applied the principle to a printer's apprentice, who was a private in a volunteer battalion, and resided with his father in Chichester, who had sent in his name for active service in the war then being waged in South Africa, was certified as fit by the medical inspector, and, pursuant to an order, went into barracks at

(1) 41 I. L. T. R. 160. (2) [1901] P. D. 78.

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Chichester, and while there made his will, being at that time under twenty-one years of age. An order was subsequently received from the military authority, pursuant to which he embarked with his regiment, and he died from a wound received in battle. Sir Francis Jeune held that he was "a soldier in actual military service" at the time when he made the will. Sir Francis Jeune gave as "the true test to be applied in all these cases (p. 83)—some step taken towards joining the forces in the field. The step may be a small one both as regards time and place"; and he added that "by taking that first step of going into barracks with a view of being drafted to the front, he brought himself within the words and meaning of the 11th section of the Wills Act, and that he was then engaged in actual military service."

When this case was opened, Mr. Hanna, for the defendant, admitted that if the judgment of Mr. Justice Madden in *In the Goods of Sarah Hale* (1) was good law, and that I was bound to follow it, he could not contend that the deceased was not a seaman at sea. In that case the deceased lady wrote out the documents some days before she sailed, in her own lodgings in Liverpool, where she stayed between voyages. She was a typist, in the habit of travelling as a typist for the company between Liverpool and New York. She went down in the "Lusitania." Madden J. held she was "a seaman, being at sea when she wrote the documents." Mr. Hanna said I was not bound to follow that decision, as there was a decision to the contrary in the English Courts, decided by Mr. Justice Bargrave Deane: *In the Estate of William Anderson* (2). The decision of Mr. Justice Madden was, he said, an ex parte decision, and the case before Mr. Justice Bargrave Deane was fully argued. I am of opinion that I am not called upon to decide what my duty would be under the supposed conflict of authority, for there is no conflict. There is a sentence in the English report—"The language of section 11 of the Wills Act (1 Vict. c. 11) is peculiar. The words are not identical with regard to soldiers and mariners. To come within the exceptions in that section, a soldier must be in actual military service; and if this man had been a soldier, or if those words had applied to sailors or mariners, it might have been argued successfully that he came within the exceptions. But when

(1) [1915] 2 I. R. 362. (2) [1916] Probate Division, at p. 49.

the deceased wrote out this document, he was not at sea; he was, in fact, at home in his father's house." "The deceased was not a soldier, and he was not a seaman at sea." The learned Judge makes it clear: "This would be a perfectly good will if made when this man was at sea." . . . "If the deceased had been at sea at any period before he wrote out the document before me, it might have been argued that he was within the words of sect. 11."

Mr. Justice Madden's reasoning is alleged to be at variance with this. He traces the words "in actual military service" back to the Roman phrase "in expeditione," and cites *In the Goods of Hiscock* (1), which applied this test to a soldier: "Had he taken some step at the time when he made his will to bring himself within the words of the section?" He cites also the decision of Mr. Justice Boyd in *In the Goods of Godley* (2), which followed, and applied the judgment of Sir F. H. Jeune in *In the Goods of Hiscock* (1). He goes on: "There is less difficulty in applying a similar test to the case of a seaman preparing for a journey, for the words 'in actual military service' are more definite and specific than the phrase 'being at sea.' In my opinion Miss Hale was 'at sea' at the time of making her will in a more real sense than Hiscock was in actual military service under the circumstances in the case stated in the judgment, from which I have quoted, of Sir F. Jeune."

The argument of Mr. Hanna is based upon the assumption that Mr. Justice Madden has decided that preparing to go to sea is equivalent to being at sea, and that Mr. Justice Bargrave Deane decided that preparing to go to sea was not equivalent to being at sea. Neither Judge so decided. On the facts before him Mr. Justice Madden decided that preparing to go to sea was equivalent to going to sea, and Mr. Justice Bargrave Deane decided that, upon the facts before him, the man was not a seaman. I suppose there is involved this discrepancy. Mr. Justice Bargrave Deane seems to say that a man called up to be a seaman was not a seaman at sea. In the English case the man had been merely called up. In the Irish case the lady was in the actual service of the company, and was resuming her occupation as a seaman. Mr. Justice Bargrave Deane expressly, as I have

(1) [1901] P. D. 78. (2) 41 I. L. T. R. 160

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shown, expressly differentiated the two cases. This is not a matter left in any doubt. Mr. Justice Madden's judgment was not cited in the argument before Mr. Justice Bargrave Deane. It was not applicable. But in a subsequent case, in the same volume of the reports, *In the Estate of Ada Stanley* (1), it was cited before Mr. Justice Bargrave Deane himself, and the principle of it approved of and followed. The letter in that case was written during an interval of leave on shore in this country, but after the writer had received orders to re-embark. The lady there was a nurse under the Queen Alexandra Imperial Nursing Service, and was on leave pending further orders.

It is unnecessary for me, therefore, to lay down any rule as to the binding effect of judicial decisions upon Judges. Those who are interested will find some reading on it in Halsbury, vol. xviii, ss. 8, 210, and in the 1917 Supplement, 842–843. There is a luminous passage in Lord Haldane's judgment in *Kreglinger* v. *New Patagonia Meat and Cold Storage Company* (2). I do not wish to be taken as adopting as a binding rule Lord Justice Scrutton's obiter dictum that one King's Bench Judge should follow another King's Bench Judge. Of course a Judge of the King's Bench Division is bound by a judgment of the Court: *Reg.* v. *Justices of Queen's County* (3). The comity of Judges, as the other courtesies of life, cannot be set down as in a handbook of judicial etiquette. We recognized lately the courtesy of the English Judge who, contrary to his own opinion, followed the decision of two Irish Judges, and declined to follow the decision of the dissentient Judge, with whom he agreed. The courtesy resulted in additional costs, for, on appeal, the decision of the dissentient Irish Judge was approved of. And it would take a good deal of argument to persuade me that I should not accept a judgment of Mr. Justice Madden, to whom Probate causes were assigned, exercising as he did a peculiar jurisdiction, in succession to the President of the Probate Division, from whom was transferred to him all the jurisdiction of the Judge of the Court of Probate, before the Judicature Act. Madden J.'s decision in *The Goods of Sarah Hale* (4) was a considered judgment, all the reported cases

(1) [1916] P. D., at p. 192.
(2) [1914] A. C. 25, at p. 40.
(3) 10 L. R. Ir. 294.
(4) [1915] 2 I. R. 362.

having been brought to his notice in a full and clear manner by Mr. Tobias, and that judgment followed a decision to the like effect by another Irish Judge, Mr. Justice Boyd, in *In the Goods of Godley* (1). I say so much only to avoid the appearance of accepting Mr. Hanna's suggestion as to the duty of a Judge in the circumstances he assumed.

The facts in this case clearly bring it within the principles laid down by Madden J., namely—1. That the section of the Wills Act is not confined to actual seamen. 2. That the section extends to women. 3. That a person who is not actually at sea may be a seaman.

I adopt these three principles, and apply them to the facts of the present case. It is not essential that he or she should be actually on the sea; but the contrary principle is not affirmed. It does not necessarily follow that a seaman who is looking forward to a voyage is a "seaman being at sea."

Captain Birch was a seaman who had daily duties to perform. For six or seven hours a day he was on the sea; the rest of the day he was on shore. When his boat was laid up he remained on shore in his own house with his wife and family. He had been so living for some weeks, and his time for resuming his daily sailings was approaching when he made this will. Was he within the principle of a seaman preparing for a voyage? When the captain reached his home, was he a seaman being at sea or was he a seaman being on shore? [His Lordship then stated the facts as above set out.] On these facts, was Captain Birch "a seaman being at sea" within the principles of the authorities I have referred to? If he had made the will when he went ashore on the 17th November, would he then have been a seaman being at sea? Apply the other tests. "Had he taken a step?" Was he preparing for a voyage? If not on the 17th, when, then, did the principle begin to operate? Is there anything to show that the captain was doing anything really preparatory to a voyage?

Applying the legal principles which I accept to the facts of this case, I am of opinion that when Captain Birch was sitting in his own house on the day he made the will he was a seaman on shore, and not a seaman being at sea.

Solicitors for plaintiff: *W. M. Moore & Son.*

Solicitors for defendant: *Longfield, Kelly, & Armstrong.*

H. H.

(1) 41 I. L. T. R. 160.

Appeal.
1919.
May 5, 8.

ROBERT SHAW, APPLICANT; COUNTY COUNCIL OF WICKLOW AND BALTINGLASS No. 1 RURAL DISTRICT COUNCIL, RESPONDENTS (1).

Malicious injury—Information—Essential averments—Knowledge as to person committing injury—Grand Jury (Ireland) Act, 1836 (6 *&* 7 *Wm.* 4, *c.* 116), *sect.* 137.

In his examination upon oath under sect. 137 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), to ground an application for malicious injury to property the deponent must specify whether he knows or does not know the person or persons who committed the injury; and a statement that a certain person had been remanded to jail on the charge of having committed the offence is not a compliance with the section.

CASE STATED for the Court of Appeal by Mr. Justice Gibson as Judge of Assize in the county Wicklow at the Spring Assizes, 1919, on the hearing of an appeal from the County Court Judge under the Local Government (Ireland) Act, 1898, sect. 5.

Robert Shaw had applied for compensation for loss sustained by the malicious burning of a cowhouse, and the County Court Judge awarded him £70, with costs and expenses. The information made by the applicant, having set out the nature of the injuries to his property, stated:—"And deponent further saith that a man named Joseph Cranny has been remanded to Mountjoy jail on the charge of having committed the above offence." The information contained a recognizance in the following terms:—"And the said informant binds himself to attend when and where called upon to give evidence against the said accused for said offence, or otherwise to forfeit to the Crown the sum of £5."

On the hearing of the appeal before Mr. Justice Gibson the preliminary objection was raised that the information and recognizance were insufficient under sect. 137 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), and the rules thereunder. Subject to this objection, the learned Judge decided that the decree of the County Court Judge should be affirmed, with £8 costs of appeal and £7 for witnesses' expenses. Should the

(1) Before MOLONY C.J. and RONAN and O'CONNOR L.JJ.

preliminary objection be allowed, the decree was to be reversed and the claim dismissed, with twelve guineas costs of appeal and six guineas costs in the Court below.

At the request of the county council he stated a case; and the question for the Court of Appeal was: whether the preliminary objection was valid and should be allowed.

W. G. Gibson K.C. and *R. J. Kinahan,* for the appellants (Wicklow County Council):—

Compliance with the provisions of sect. 137 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), is a condition precedent to an application for compensation for loss or damage occasioned by a malicious injury to which that Act applies or has been extended. Neither the "examination upon oath" (i.e., the information) nor the recognizance of the applicant in this case is a sufficient compliance with the requirements of the section. The information does not "specify," as required by the section, whether the informant knows the person or persons who committed the injury, or any of them. It states that "a man named Joseph Cranny has been remanded to Mountjoy jail on the charge of having committed the above offence." It does not state that the informant knows, or even believes, that the injury was committed by Joseph Cranny. The statement referred to is equally consistent with either knowledge or ignorance on the part of the informant as to the perpetrator of the offence. A county council is entitled to the fullest information and assistance from an applicant for compensation. The omission from an information of a statement that the person or persons who committed the injury were "unknown" to the applicants for compensation has been held to be fatal to their claim: *In re Tobin* (1).

The recognizance is insufficient also. It does not bind the informant "to prosecute such offender or offenders by indictment or otherwise according to the laws of this kingdom," which is what the section requires. It binds the informant "to attend when and where called upon to give evidence against the said accused [i.e. Joseph Cranny] for the said offence." This is a wholly different obligation from that contemplated and required by the

(1) [1860-4] Reserved Cases, 2.

Appeal. 1919. SHAW v. WICKLOW CO. COUNCIL.

section. A recognizance to give evidence is not a recognizance to prosecute: sect. 34 of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93). Rule 4 of the Statutory Rules of Procedure of the 22nd March, 1899, made in pursuance of sect. 5, sub-s. 7, of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), directed that in cases to which sect. 137 of 6 & 7 Wm. 4, c. 116, applied, or has been extended, the examination on oath and recognizance required by that section shall be in the form No. 1 in the schedule to such rules, or to the like effect. The recognizance in this case does not even follow that form, questionable though it, too, may be.

The defects in the applicant's information and recognizance are not merely in respect of requirements of the rules: they are violations of the statute itself, and cannot be remedied by amendment: *Smith* v. *Dublin County Council* (1); *Manders* v. *Kildare County Council* (2); Rule 17 of the Statutory Rules of Procedure of the 22nd March, 1899.

O'Byrne, for Baltinglass No. 1 Rural District Council, supported the appeal.

Dudley White K.C. and *H. Hughes*, for the respondent (the applicant):—

The information, as sworn, is consistent with a statement to the effect that the deponent did not know the person or persons who committed the injury, and it should be so treated. The applicant did not know who committed the offence, but he had a strong suspicion that Cranny was the offender. In these circumstances he complied sufficiently with the terms of the statute.

The obvious injustice which would follow from the construction put upon the section by the appellants could not have been intended by the Legislature. The Court is entitled to examine the surrounding circumstances to see whether the view contended for by the appellants would lead to injustice: *The Queen* v. *The Inhabitants of Fordhaw* (3). [They also cited *Lester* v. *Torrens* (4) and *Powell* v. *The Main Colliery Company* (5).]

Gibson K.C., in reply.

(1) 1 N. I. J. R. 107; 35 I. L. T. R. 110.
(2) 43 I. L. T. R. 9.
(3) 11 Ad. & E. 73, at p. 86.
(4) 2 Q. B. D. 403.
(5) [1900] A. C. 366.

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1919.
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v.
WICKLOW
CO. COUNCIL.
May 8.

MOLONY C.J.:—

By sect. 137 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), every person who applies for compensation under the provisions of the Act for loss or damage occasioned by malicious injury shall, within the prescribed period, "unless prevented by illness or other sufficient cause, give in his, her, or their examination upon oath . . . before some justice of the peace of the county where such injury shall have been committed, thereby specifying whether he, she, or they do know the person or persons who committed the said injury or any of them, and in such case such examinant or examinants shall be bound by recognizance to prosecute such offender or offenders by indictment or otherwise according to the laws of this Kingdom."

In the present case Robert Shaw, on the 17th December, 1918, swore an information, in which he stated that on Sunday evening, the 15th December, 1918, certain property of his was wantonly and maliciously destroyed by fire, and the information contained a statement in the following terms:—"And deponent further saith that a man named Joseph Cranny has been remanded to Mountjoy jail on the charge of having committed the above offence." The information further contained a recognizance in the following terms:—"And the said informant binds himself to attend when and where called upon to give evidence against the said accused for the said offence, or otherwise to forfeit to the Crown the sum of £5."

The only question to be determined in the present case is whether the information as sworn was a sufficient compliance with the provisions of the section. Under the section the applicant was bound to specify whether he knew the person or persons who committed the said injury, or any of them. If, however, he did not know them, he was bound to state that such person or persons was or were unknown to him, and the absence of such an averment would be fatal to the claim: *In re Tobin* (1).

In the present case all the applicant swore was that a man named Joseph Cranny had been remanded to Mountjoy jail, charged with having committed the offence, but it is clear to my

(1) [1860–1864] Reserved Cases, 2.

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mind that such a statement does not specify whether the deponent knows or does not know the person who committed the injury. The fact that Joseph Cranny had been arrested and remanded might be quite true, while at the same time the deponent might know that some other person not in custody was the real culprit, and in such case would be bound to name him. If, however, the deponent did not know who committed the injury, he would be bound to say so, although he might in the information also refer to the fact that a man had been charged with the offence, and was then in custody in connexion with it.

In my opinion, the information is not a compliance with the provisions of the section; and as the applicant has failed to comply with the statutory conditions, he is not entitled to obtain compensation. There is no power to dispense with any of the provisions of the section: *Smith* v. *The County Council of the County of Dublin* (1).

A further objection was raised that the recognizance was bad, inasmuch as it was not a recognizance to prosecute, but simply a recognizance to give evidence against the person who was already in custody charged with the offence. Having formed a clear view upon the other ground, I do not think it necessary to decide the question as to the recognizance, but I am not to be taken as expressing an opinion that the recognizance in the present case is sufficient.

The proper order to make is to reverse the decree of the County Court Judge, and to dismiss the claim, with £6 6*s*. costs in the County Court, and £12 12*s*. costs of the appeal to the Judge of Assize as mentioned, each party to abide their own costs of this appeal.

RONAN and O'CONNOR L.JJ. concurred.

Solicitor for the appellants; *J. H. M'Carroll.*

Solicitor for the Baltinglass No. 1 Rural District Council: *P. J. Byrne.*

Solicitors for the respondent: *Harris & Greene.*

C. L.

(1) 1 N. I. J. 107; 35 I. L. T. R. 110.

IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE ACT, 1918, AND IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE REGISTRATION OFFICER FOR COUNTY TYRONE. BETWEEN WILLIAM J. SINCLAIR, APPELLANT, AND PATRICK O'KANE AND OTHER RESPONDENTS.

Appeal. 1918. Nov. 26.

Registration—Electors' lists—Objection to claim—Omnibus objection—Practice —Representation of the People Act, 1918 (8 *Geo. 5, c.* 64).

A duly qualified parliamentary elector who objected to a number of persons whose names appeared as claimants in the list of claims (parliamentary and local government), published by the registration officer, sent one notice of objection to the registration officer, including all possible grounds of objection in respect of both franchises, and in place of inserting the name of one individual as objected to in the body of the notice, he added a schedule consisting of the list of claims as published by the registration officer, with the names of persons to whom no objection was taken struck out.

Held, that the notice of objection was bad, and that a specific notice of objection should be sent in respect of each claim objected to, whether in respect of the parliamentary or the local government franchise.

This was an appeal against an order of the County Court Judge of Tyrone made in the above matter, and dated the 25th day of October, 1918.

William J. Sinclair, a duly qualified elector, objected to the entry of the name of Patrick O'Kane (amongst a number of other names) in the electors' lists for a registration unit of the county of Tyrone, as a parliamentary elector and as a local government elector. The objection was in the following form:—

Registration Unit . . . Polling District, Dunamanagh. W.R.

Objection to lists of parliamentary electors and of local government electors.

To the registration officer for the constituency of North-west Tyrone and for the local government electoral area of Tyrone.

Address Courthouse, Omagh.

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I hereby give you notice that I object to the entry of the several names in the schedule hereto

Names in full. Surname first.	Residence or Property occupied and abode of non-resident occupier.	Qualification. Parliamentary.	Qualification. Local Govt.

in the above registration unit as a parliamentary elector and as a local government elector.

The grounds of my objection are:—1. The person is not of statutory age. 2. The person is under legal incapacity. 3. The person has not the requisite residence qualification. 4. The person has not the requisite business premises qualification. 5. The person, being a woman, is not entitled to be registered as a local government elector in respect of the occupation of a dwelling-house or of premises of the requisite value, and is not the wife of a man entitled to be so registered. 6. The person was not on the last day of the qualifying period in occupation as tenant or owner of any premises in the said registration unit or elsewhere in said electoral area of Tyrone, and did not during the qualifying period occupy as tenant or owner any premises in said electoral area. 7. The person, being a woman, is not the wife of a man entitled to be registered as a local government elector in respect of premises in which they both reside.

Then followed particulars of the parliamentary qualification of the objector, William J. Sinclair. The schedule consisted of the list of claims (parliamentary and local government) as published by the registration officer, the objector having struck out all the names to which he had no objection, and leaving forty-eight names as objected to.

The registration officer having held the objection good, Patrick O'Kane appealed to the County Court Judge, who allowed the appeal, and directed that the name of Patrick O'Kane should be inserted on the register. Hence this appeal to the Court of Appeal.

Babington K.C. and *Smylie*, for the appellant:—

Clause 6 of the Order in Council of March 22nd, 1918, provides that the forms specified in Part II of the schedule to the order or "forms to the like effect" shall be used in the cases to

which they are expressed to be applicable, and shall be the prescribed forms for Ireland. This form is "to the like effect" as the forms prescribed: *The Queen* v. *The Mayor and Assessors of the Borough of Harwich* (1). It is sufficient that the person objected to receives the notice of objection, and knows that he is objected to on all grounds. An omnibus notice of objection was always served under the old practice.

Murnaghan, for the respondent:—

There must be a specific objection to a specific claim, in respect of both the parliamentary and the local government franchise. (He was stopped by the Court.)

MOLONY C.J.:—

By the Representation of the People Act, 1918, new rights to the franchise were created. The object of the Legislature was that every qualified person should be entitled to exercise the franchise, and that there should be an opportunity afforded to every legitimate objector to object to the insertion of the name of an unqualified person on the electors' lists. There are two franchises to be considered, both in respect of men and women, the parliamentary and the local government franchise. As regards men, the right to the parliamentary franchise may arise either in respect of the requisite residence qualification, or in respect of the requisite business premises qualification. A woman may be entitled to be registered as a parliamentary elector (for a constituency other than a university) if she has attained the age of thirty years, if she is not subject to any legal incapacity, and is entitled to be registered as a local government elector in respect of the occupation in that constituency of lands or premises (not being a dwelling-house) of a yearly value of not less than £5, or of a dwelling-house, or if she is the wife of a husband entitled to be so registered. As to the local government franchise a man is entitled to be registered as a local government elector if of full age, and not subject to any legal incapacity, and is on the last day of the qualifying period occupying, as owner or tenant, any land or premises in that area, and has during the whole of the

(1) 1 E. & B. 617.

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qualifying period so occupied any land or premises in that area, or, if that area is not an administrative county or a county borough, in any administrative county or county borough in which the area is wholly or partly situate. A woman is entitled to be registered as a local government elector when she would be entitled to be so registered if she were a man, and when she is the wife of a man who is entitled to be so registered in respect of premises in which they both reside, and she has attained the age of thirty years, and is not subject to any legal incapacity. These are the provisions of the Act relating to qualification. Rules were then made and inserted in the schedule relating to the preparation of the register, and the duty is cast on the registering authority of causing sufficient inquiry to be made, and of preparing, or causing to be prepared, lists, referred to in the Act as electors' lists, for each registration unit. He is then to publish these lists in the prescribed form, and at the same time he is to publish a notice specifying the mode in which, and the time within which, claims and objections are to be made under the rules. Clause 9 of the schedule deals with claims being sent in. "Any person who claims to be entitled to be registered as a parliamentary or local government elector, and who is not entered, or is entered in an incorrect place or manner, or with incorrect particulars on the electors' lists, may claim to be registered, or to be registered correctly, by sending to the registration officer a claim in the prescribed form" not later than the days specified. The forms which are prescribed are prescribed under an Order in Council of the 22nd March, 1918, which provides (clause 6): "The forms specified in Part II of the schedule to this order, or forms to the like effect, shall be used in the cases to which they are expressed to be applicable, and shall for the purposes of the Act be deemed to be the prescribed forms for Ireland." Then, when we come to the forms, we find in the first place forms applicable to claims to be registered, and secondly forms of notices of objection. The form of claim to be registered as a parliamentary elector in respect of a residence qualification sets out the occupation of the qualifying premises for the necessary period, and so also where the claim is in respect of the business premises qualification, the necessary qualification

must be set out. The name of a claimant having been duly inserted on the electors' lists, it becomes the function of a person who objects to the retention of the name on the lists to send in a notice of objection.

Clause 12 of the first schedule provides: "Any person whose name appears on the electors' lists for a constituency or local government electoral area, may object to the registration of any person whose name is included in the electors' lists for the constituency or the local government electoral area, as the case may be, by sending notice of objection in the prescribed form to the registration officer not later than" the prescribed days, "and may object to the registration of any person whose name is included in the list of claimants by sending notice of objection in the prescribed form to the registration officer not later than" the prescribed days.

So far as Ireland is concerned the regulations concerning the "spring register" do not apply; there is only to be one annual registration in Ireland. Now that clause in itself clearly contemplates that the person who objects should give a specific notice in respect of the particular individual to whom he objects, and that that is the proper construction of clause 12 appears to me to be clear from a consideration of clause 13, which provides that "the registration officer shall, as soon as practicable after receiving any notice of objection, send a copy of the notice to the person in respect of whose registration the notice of objection is given." Taking these two rules together, it seems to me they contemplate the continuance of the old practice relating to objections, under which an objection was made to an individual, transmitted to that individual, and a copy of the objection lodged with the registering authority. Any doubt upon this point is entirely got rid of when one looks at the forms which are prescribed, because they contemplate first that the individual is to get the objection, and that the objection to that particular individual is to be set out in the objection. Take the first form of objection, that to a list of parliamentary electors—"I hereby give you notice that I object to the entry of as a parliamentary elector."

So also in the case of an objection to a name inserted on the list of local government electors, a specific notice of objection

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relating to an individual is clearly contemplated. It is quite clear also that a specific objection is contemplated with regard to the parliamentary franchise, and a specific objection with regard to the local government board franchise.

Is there any case to be found in which a real departure from the statutory forms has been upheld? The only case which Mr. Babington could point to is *Queen* v. *Mayor and Assessors of the Borough of Harwich* (1). In that case the section of the statute required that there should be given to the town clerk of the borough, and also to the person objected to, notice of the objection in writing according to the form prescribed, or to the like effect. The form prescribed was as follows:—"I hereby give you notice that I object to the name of A B being retained on the burgess list of the Borough of Harwich"; and in the form which was sent to James Brown the younger himself, the name "James Brown the younger" was not inserted, but instead the words "your name." It was held that the words "your name," when the notice was actually addressed to James Brown the younger, were sufficient, that the notice was to the like effect as that prescribed, and the objection was accordingly determined to be immaterial. That certainly was a very slight departure from the form prescribed; but let us see what is the form of objection given in this case. Lists have been published setting out the name of every person who is a claimant in respect of either the parliamentary or local government franchise, or both. Each person who is a claimant in respect of the parliamentary franchise is entitled, if objected to, to get a notice of that objection; each person who is a claimant in respect of the local government franchise is entitled, if objected to, to get a notice of that objection; if a claimant to the two franchises is objected to in respect of both, he is entitled to two notices. But what has been done in the present case is this—that the objector, taking the list as printed by the registering authority, has struck out the names to which he has no objection; he leaves in some forty-eight names, some being parliamentary electors, some local government electors, some both. The objector then puts an omnibus objection in front of the list, and sends the entire list to the registering authority. Now of these objections,

(1) 1 E & B. 617.

some are applicable to parliamentary electors, some to local government electors, some to both; some are applicable to men, some to women; all are included in the one notice. So far as the parliamentary electors are concerned, there could be no objection to a notice in accordance with the accustomed practice in former days, addressed to the individual objected to, and setting forth every objection which could be made in respect of a claim to the parliamentary franchise. There can, in my judgment, be no objection to still giving notice in that form.

There can still be no objection to a notice in respect of a claim to the local government franchise setting forth every possible objection to the claim as regards qualification for that franchise. There is, however, no authority whatever for this particular form of objection, which has mixed together all the objections which could be made to local government electors, or to parliamentary electors, or to both, which is addressed, not to an individual, but, in this case, to forty-eight individuals—one in respect of which a man may, or may not, be attentive enough to pick out his own name, and which, as I have said, combines the objections to the parliamentary franchise and to the local government franchise, although it was clearly contemplated by these rules that there should be separate and specific notices of objection given as regards the two franchises.

I cannot for a moment think that it was ever intended by the Legislature that such an omnibus notice of objection should be held good, so as to cover the cases of each of these forty-eight individuals, some of whom are men, some of whom are women, some claimants to the parliamentary franchise, some to the local government franchise, some to both.

In my opinion the County Court Judge was right in his determination, and his order should be affirmed.

RONAN L.J.:—

I am of the same opinion, and for the same reasons. It seems to me impossible to hold that this is a valid notice of objection to the name of a particular man being on the register. He would have to consider it and study it to find out what it meant, and whether his name was objected to. It is in no sense a compliance with the statutory requirements.

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O'CONNOR L.J.:—

I agree that the intention of the Act of Parliament was that each notice should be confined to either the parliamentary or the local government franchise, as the case may be, and should also be confined to the particular individual objected to, and not relate to the entire panel. As to the first point, I think that we find, on looking at the schedule and the prescribed forms, what amounts to a statutory enactment, that there should be a separate notice given in respect of each franchise; in other words, a prohibition against including in one notice of objection objections in respect of the two franchises. With regard to the inclusion of a number of individuals in the one notice, while I think that Mr. Babington was correct in stating that as a general rule a notice of objection may be a valid notice, although departing from the particular wording of the form provided—which is good sense, because the person objected to might know perfectly well what the grounds o objection were, although there were errors in following the form—yet here we have something entirely different. The Act of Parliament contemplates notice being given to a particular individual. We have here a complete departure from the frame-work and character and the intention of the notice specified in the Act, and where we find that, it is impossible to say that the case comes within the general rule that a mere technical error in the wording of the notice will not vitiate it. Any other conclusion would lead to grave inconvenience. If the procedure adopted here is valid, the entire panel might be put in, if the entire panel held views contrary to those of the objector, and a person in humble circumstances, and indeed another not in humble circumstances, might well go through the document without observing his own name, or realizing that it comprised an objection relating to him.

In my opinion the decision of the County Court Judge was right, and should be affirmed.

Solicitors for the appellant: *Wilson & Simms.*
Solicitor for the respondent: *G. Murnaghan.*

R. ST. J. C.

FLYNN *v.* CONNELL (1).

K. B. Div.
1919.
June 23, 24, 30.

Tort—Seduction—Service with another under contract with parent—Action by parent.

The plaintiff's daughter, a young girl, living with him, having been hired by the defendant from the plaintiff under three successive yearly contracts as domestic servant, was seduced by him in the second year's service (1916), and intercourse having been renewed in the third year (1917), gave birth in the workhouse to a child. The jury having found that the defendant hired the girl with the object of seduction and also as domestic servant:

Held, per Gibson J., that the principle of *Speight* v. *Oliviera* (2 Starkie, 493) applied, and that the contract of service was as against the plaintiff invalid.

Held also, than an objection that the pleading did not specifically rely on the principle of *Speight* v. *Oliviera* in the circumstances failed; and also that in assessing damages the jury might consider the circumstance that the infant was living and in the plaintiff's house, though there was no legal obligation on the plaintiff to maintain it.

Speight v. *Oliviera* (2 Starkie, 493) considered.

MOTION to set aside judgment.

The plaintiff, by his statement of claim, averred that he suffered damage from the seduction and carnally knowing by the defendant of Mary Anne Flynn, daughter and servant of the plaintiff, on or about the last week of April, 1917, whereby the said Mary Anne Flynn became pregnant with a child, of which she was delivered on the 31st day of January, 1918. The plaintiff, Michael Flynn, in consequence lost the services of the said Mary Anne Flynn, and incurred expenses in and about the taking care of and nursing her.

The defence consisted of the usual traverses. Issue was joined on these pleadings, and the action was tried together with an action by Mary Anne Flynn against the same defendant for breach of promise of marriage before the Right Hon. the Lord Chief Justice and a common jury of the city of Dublin on the 19th May, 1919.

(1) Before GIBSON and PIM JJ.

K. B. Div. 1919.

FLYNN *v.* CONNELL.

The following are the material portions of the learned Judge's report:—

This action was brought by Michael Flynn for the seduction of his daughter, Mary Anne Flynn, and another action was brought by Mary Anne Flynn for breach of promise of marriage. By order of the Court, dated 9th May, 1919, it was ordered, both sides consenting, that the actions should be tried together as one action.

In Mary Anne Flynn's action the jury found that the defendant did not promise to marry the plaintiff, and judgment was entered for the defendant accordingly, and this has not been challenged.

Evidence.—First witness—Michael Flynn (plaintiff). Aged seventy-two years. Lives on the borders of Kerry and Cork. Labourer. Six children and self at home. Wife dead three years next August. Connell lives a few yards away. Has seventeen cows. His wife died four years ago. Some time after that defendant had an interview with me in 1915. He said: "Will you let your daughter come to me now?" I said I would. He made the bargain—1, February to Christmas, £9 10*s.*; 2, I to have the work of one horse on a day; 3, she was to stay on for January, and was to be paid for January before a new bargain was made; 4, he was bound to leave her down to me—once a while for doing jobs when my wife was sick—on Sunday and piece of Saturday. She worked out that year. I got the hire of the horse; came home every Saturday and Sunday. My wife was in hospital sick; daughter Maggie was then about eleven or twelve; Mary Anne was seventeen or eighteen; the boys were very young. On Saturday and Sunday she would bake bread; do repairs.

1916. February to Christmas at £10 or £11 a year; a horse as before, and same bargain about coming home. All this year she came home.

1917. Bargain February to Christmas, £14. I to have work of horse three days. She came home same way. May, 1917, he asked Maggie to go work in addition to Mary; 4*s.* a week for milking morning and evening, and leaving her to me rest of the day. Maggie went and came back in the night. She might stop there an odd night. I remember month of July of the year when Maggie went to defendant. Maggie and Mary Anne both came

home one day. Maggie did not go back. Mary Anne went back. After that I went to see defendant. I accused him of beating Maggie. I said nothing about Mary Anne. Three weeks or a month after I went to him again; I went for money. Out in August. I gave him a month's notice that I would take away Mary Anne. When month up I went again. He threatened to kill me. I saw Mary Anne and spoke to her. He was between me and her. She would not come away. "She couldn't come; she was promised too much." Same month I went again, and did not get her. I went three or four times altogether. My daughter did not come home at all. I went to see the priest. Mary Anne stayed on at house and did not come home at all after I had given him the month's notice. I had proceedings at Petty Sessions with defendant. I summoned him for beating Maggie, and about the hire of two horses. The cases were dismissed. The child was born 31st January, 1918, in Kanturk Union. I heard something about it, and I went that day to defendant's house. I asked him where she was, and he said she was out. I asked him could I not see her, and he said she was not at home. Next day I found her in hospital in Kanturk. She came home in three weeks, and is at home since.

. . . . . .

Cross-examined— . . . "Paddy M'Mahon was not there until June."

Re-examined—"I was there when M'Mahon come to Connell. He asked for work and got it. It was 8th June, 1917."

Second witness, Mary Anne Flynn—"Twenty-three years of age. . . . There was no bargain till 1st February. I went to him September, 1914. I remember bargain, February to Christmas. Cannot say about the wages . . . July, 1916, he called me up in the room. He put his hand round my neck and asked me would I be his wife and I said I would. He had 'communications' with me all the time, then."

To me—"I mean by 'communications' misconduct."

. . . . . .

"About two months after he commenced, had communication with me, going on Sunday to my own home, in a field. Maggie came to house 1st May, 1917. April, 1917, Connell had

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connexion with me out in the fields, going home from Connell's place. . . . In August I knew I was carrying a baby. I did not go home after August. He told me not to go home any more. He told me to keep my wages, and not to give it to my father any more . . .

"January, 1918, I was taken to the workhouse—26th January. Before I went he said he would give me £40 by not putting the child on himself. I said nothing. He said to put it down on the man that was there—Paddy M'Mahon."

. . . . . .

I asked her to give me in her own words a description of what happened in April, 1917.

To me—"We left the house together. We were going down in the garden. It was in his own garden. He had connexion with me. I went spreading the potatoes. I went back to the house. On that day I did not go to my father's house at all. This was the only time in the month of April he had connexion with me."

I then read my note of her evidence, given on her direct examination:—

"April, 1917, Connell had connexion with me out in the fields, going home from Connell's place." Answer—She says it is a mistake to say, as note says, that it was going home from Connell's place.

Cross-examined by leave—"My mother died in the Cork Asylum."

Re-examined by plaintiff's counsel by leave:—

"In the month of April I was out working with defendant. I was going home. Connell's children were in the house, and were told to stop inside till he came back. He put his hands round my neck, and he pulled me down and I had connexion with him then. I went to my father's house, and Connell went to his house."

I then read my note of what she stated to me in answer to my question, and asked her was it true. She answered, "It is true what you have first read for me."

Third witness, Maggie Flynn—"Fifteen or sixteen years of age. . . . Saw Connell bring presents to sister. She told me she would be married soon to him. Connell could hear that. Connell said

nothing. May, 1917, Connell and I and my sister were out at the turf-bank. He said he would get married to her. My sister said 'All right.' After that I had a row with Connell—went home. M'Mahon came to the house 8th June, 1917, and stayed nearly a week. He was working in the fields with Connell."

Fourth witness, John Flynn (brother of last witness)—"Twenty-five or twenty-six years of age. . . . Father Brick asked Connell was he the father of the child. Connell said 'No.' He asked my sister was Connell the father of the child. She said 'Yes.'"

. . . . . .

Plaintiff's case closes.

Hanna K.C. asked me for a direction—1, as regards the action of seduction, there was no evidence of service sufficient to sustain the case; and 2, as regards the action for breach of promise, there was no evidence of corroboration. I said that my present view was in favour of Hanna K.C., on No. 1, and against him on No. 2; but as Lynch K.C. was not present, I said I would hear him in the morning before deciding.

Friday, the 16th May, 1919:—

Lynch K.C. said: The girl was seduced July, 1916. There was a new contract of service, from February to December, 1917, entered into. There is a case to go to the jury as to whether this new contract was entered into not bona fide, but with intent to continue debauching the girl.

He relied on *Speight* v. *Oliviera* (1); and that it was not necessary to plead this specially: *Morgan* v. *Molony* (2).

Hanna K.C. objects to any question founded on *Speight* v. *Oliviera* (1) being left, and relied on necessity of pleading fraud, and says (as was the fact) that this point was never stated or relied on during the plaintiff's case. He also said he would be prejudiced by the case being left to the jury at this stage. I thought there was no evidence of service at the time of the seduction sufficient to support the action, but that there was some evidence of a cause of action on the principle of *Speight* v.

1 2 Starkie, 493. (2) I. R. 7 C. L. 101.

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Oliviera (1), and I said I would leave a question accordingly, and reserve all Hanna's objections.

Defendant's case :—

First witness, Patrick Connell—The girl entered my employment 1914—October 1st to February, 1915. Contract made from February to Christmas, £11 10*s.*, and a day of the horse. Similar bargain following year, £13, and a day of the horse. Next year £14, and a day of the horse. There was never a word of the girl going home and doing work in her father's house . . .

I read to him her account of the incidents of July, 1916, and he said there was no truth in any of the statements read by me from her evidence.

Examination continued.—I never had connexion with her at any time. I never promised to marry her . . .

Second witness, Mrs. Jane Horgan (sister of defendant).—"Live a small field away. December, 1917, first heard about Mary Anne from a friendly woman. I spoke to Mary Anne. She told me there was no truth in it; not to give in to everything I hear" . . .

Defendant's case closes.

I stated that I proposed to leave the following questions to the jury :—

1. Did the defendant debauch and carnally know the plaintiff, Mary Anne Flynn?

2. Is the defendant the father of the child of which plaintiff, Mary Anne Flynn, was delivered on the 31st January, 1918?

3. Did the defendant enter into the contract to employ the plaintiff, Mary Anne Flynn, in January, 1917, with the object and intention of gaining possession of the person of the said plaintiff, and of seducing her?

4. Did the defendant promise to marry the plaintiff, Mary Anne Flynn?

5. If you answer 1, 2, and 3 in the affirmative, assess the damages to which the plaintiff, Mary Anne Flynn, is entitled.

(1) 2 Starkie, 493.

Hanna K.C. objects to any questions being left founded on the principle laid down in *Speight* v. *Oliviera* (1), and repeats his requisition. I charged the jury; and in reference to the 3rd question, I explained to them the law as laid down in *Speight* v. *Oliviera* (1), and referred to the evidence on both sides.

There was no objection to my charge. The jury retired at 3.30 p.m, and, shortly before 6 p.m., returned into Court with the following question written out:—

"If the first three questions are answered in the affirmative, and damages assessed, will such damages cover the maintenance of the child?"

I had left Court in order to fulfil an important public engagement, but the Associate communicated with me by telephone. Before I could get back to Court, however, the jury had answered the questions as follows:—

1. Yes.
2. Yes.
3. Yes; and also as a domestic servant.
4. No.
5. £50; and also that the defendant is to maintain the child for fourteen years.

Having regard to the answer to the 5th question, I got the jury back on Monday, and recharged them on the question of damages. I explained to them that damages for seduction were not confined to compensation for loss of service, and that they were also entitled to take into consideration the wounded feelings of a parent. I also explained to them that they could not by their verdict impose an obligation on the defendant to maintain the child for fourteen years, or for any period; and I also informed them that there was no obligation on Mary Anne Flynn's father to do so. I told them further that there was no law of affiliation in this country, as in England; that the obligation to maintain an illegitimate child in this country rested primarily on the mother, and that the putative father could be made responsible only by agreement, or at the suit of the guardians in a case where the mother and child became inmates of a union.

(1) 2 Starkie, 493.

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The jury retired, and after some time came back with the following question written out:—

"If damages are assessed, can Mary Anne Flynn take any further proceedings for the maintenance of the child?"

I explained to them that Mary Anne Flynn could not sue the putative father for the maintenance of her child unless there was some antecedent agreement to that effect, and again referred to the fact that the only liability of the putative father was the poor law liability.

The jury again retired, and after some time came out with the issue paper, having altered the answer to the 5th question from £50 to £150, and struck out the words that the defendant was to maintain the child for fourteen years.

Upon the findings of the jury in the action for seduction, I gave judgment for the plaintiff for £150 with costs up to the order consolidating the two actions, dated 9th May, 1919, and one-half of the costs of the said action from that date; and in the breach of promise action I gave judgment for the defendant with costs up to the date of the said order of the 9th May, 1919, and one-half of the costs of the action from that date.

I do not think the jury showed disregard of my directions, or of the answers which I gave to the questions which they asked. The jury certainly bestowed great attention upon the case, and I am not dissatisfied with their verdict.

The defendant's motion in the action for seduction to set aside the judgment and for a new trial was based upon the following grounds:—

1. That the verdict was against the weight of evidence.

2. That the damages awarded were excessive, showed a disregard of the directions of the learned Judge, and in particular of his answers to questions asked by the jury.

3. That the learned Judge misdirected the jury by leaving any questions to them on the issues of seduction, and by refusing the application of defendant's counsel for a direction in defendant's favour by reason of the absence of any evidence of a relationship of service between the plaintiff Michael Flynn and the said Mary Anne Flynn. That, in particular, the learned Judge misdirected

the jury by leaving question 3 for their consideration, and by disallowing the objection of defendant's counsel, who submitted—

(*a*) That there was no evidence upon which the jury could answer question 3 in the affirmative.

(*b*) That the said question raised a new issue which had not been pleaded, and that there was no application by the plaintiff to amend the pleadings.

(*c*) That the defendant was taken by surprise and prejudiced in his defence, inasmuch as the said issue had not been opened in the statement of plaintiff's case to the jury, was not dealt with in the examination of the plaintiff's witnesses, and was not mentioned by plaintiff's counsel until after the close of plaintiff's case, and formed no part of the plaintiff's case in cross-examination.

J. F. Bourke (with him *Hanna K.C.*) for the defendant:—

The damages awarded by the jury were excessive. They first assessed the damages at £50, and added a clause to the effect that defendant should maintain the child for fourteen years. They were then directed by the Judge to reconsider their verdict, and leave the maintenance of the child out of calculation. Afterwards they brought in a verdict for £150. This showed a disregard of the learned Judge's directions.

Question 3 should not have been left to the jury. It raised an issue of fraud which had not been pleaded, and there was no application to amend the pleadings. It was not opened in the statement of plaintiff's case to the jury. No evidence was directed to this issue, which was only raised by plaintiff's counsel after their case was closed, and after the learned Judge had intimated his view that defendant's counsel had no opportunity of taking instructions on the point, and defendant was prejudiced and embarrassed. There was no evidence upon which the jury could answer such a question in plaintiff's favour. They could only make an arbitrary guess one way or the other.

The defendant was entitled to judgment notwithstanding the jury's answer to question 3. The principle of *Speight* v. *Oliviera* (1) is expressly limited to cases where a defendant makes a contract of service with a girl "wholly" for the purpose of seducing her.

(1) 2 Starkie, 493.

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In this case the jury have found that the defendant's motive was partly bona fide and partly wicked. *Speight* and *Oliviera* (1) does not apply to such a state of facts.

Lynch K.C. (with him *J. A. M'Carthy*), for the plaintiff.

The case is within the principle of *Speight* v. *Oliviera* (1). There was a case to go to the jury as to corrupt intent. In all the circumstances the damages were reasonable.

Cur. adv. vult.

GIBSON J.:—

The questions argued before us have been confined to the consideration of *Speight* v. *Oliviera* (1) and damages, the Lord Chief Justice having directed against the plaintiff on the cause of action founded on his continuing to possess a claim to his daughter's service after she was hired. His attention was not called to *Ogden* v. *Lancashire* (2); *O'Reilly* v. *Glavey* (3), approved of in *Murray* v. *FitzGerald* (4); *Rist* v. *Faux* (5), on which it might have been contended that if Mary Anne Flynn was to go to her father for a day or two each week he might fill the character of master, and be entitled to maintain an action for seduction. I do not propose to discuss such question. The points argued were that: 1, the 3rd question, as to defendant's intention in employing Mary Anne, did not arise on the pleadings, and should not have been put; 2, the answer "yes, and also as a domestic servant," took the case out of the application of *Speight* v. *Oliviera* (1); 3, there was no evidence to warrant the findings as to corrupt intent; the damages were assessed in disregard of the learned Judge's instructions to the jury. Of the above points the second and third are the most important. The Chief Justice was satisfied with the verdict. The substantial controversy is as to the effect of *Speight* v. *Oliviera* (1) and its application to the situation of the litigants.

I do not analyze in detail the plaintiff's evidence (which it must be taken was accepted by the jury as true). It lacks precision. Mary Anne's exact age was not proved. On the evidence

(1) 2 Starkie, 493.
(2) 15 W. R. 158.
(3) 32 L. R. Ir. 316.
(4) [1906] 2 I. R., at p. 261.
(5) 4 B. & S. 409.

of the father she was a minor when the hiring of 1917 took place, and was probably so on her own statement of her age. There were three distinct contracts of service, for 1915, 1916, and 1917, all made with the father. It does not expressly appear that he was to receive his daughter's wages, or that, in fact, he did so; but I should be disposed to infer that he did get them, having regard to his position, family circumstances, and the age of his children. At any rate, the stipulation as to the use of the horse was for his benefit, and was an element in fixing the rate of wage. Mary Anne was first seduced in July, 1916, during the second year's service. When the defendant hired her for 1917, he took a servant who had been and probably would continue to be his concubine. In April, 1917, connexion in the field took place, whether when the girl was returning home on her off day or not, is for the present purpose immaterial; and a babe then begotten by this daylight ebullition of passion was born in the workhouse in January, 1918. Maggie, her younger sister, was hired by the defendant in 1917, and remained with him till August, when, in consequence of a dispute, she left. The plaintiff then gave the defendant notice to take away Mary Anne, but neither she nor the defendant acted on such notice. After that, she did not go back to her father's house for weekly help there, as she had previously done. She was taken by the defendant's sister to the workhouse infirmary in the end of January, 1918, and there the birth took place. The circumstances preceding her departure and what she said on that occasion are in controversy; but the jury were at liberty to act on her version, and apparently did so. If the defendant had had sexual relations with her, he must have known from her appearance that she was in the family way, and if, as she says, cohabitation continued after conception beyond August, there would be no possibility of doubt. After her confinement, she applied for and was paid what was due for wages, on the footing that she and not her father (who had, as far as he could, withdrawn his contract in August) was entitled to payment; such payment was made without his privity. It is not improbable that in the early period she may have been willing to screen, if possible, her master, for whom from long intercourse she may have conceived affection, and whom she may, indeed,

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have aspired to marry. Gross imputations were made by the defendant on Maggie, which suggested guilty connivance on the part of Mary Anne; and such statements, if false, would tend to aggravate damages. His retention of Mary Anne in his service after such misbehaviour would be unaccountable if he was innocent of immoral relations, as he alleged. I do not examine the proof on either side; the judge who heard and saw the witnesses accepts the verdict, and it must be taken as conclusive on all disputed matters of fact.

Before examining *Speight* v. *Oliviera* (1), described in Halsbury, vol. xx, p. 272, as founded on the contract of service being entered into "for the express purpose of seducing" (the word "express" appears unnecessary), I shall briefly refer to some general considerations. Seduction is an injury to the father's right. Morally it seems shocking that a master seducing by abuse of opportunity and of his authority should enjoy immunity, and it may be that where the father himself hires out his daughter, particularly if a minor, a tacit condition might be implied that the master should not make her unchaste. It may also be arguable, as suggested in *Dent* v. *Maguire* (2), that hiring with view to seduction may be actionable within *Evans* v. *Walton* (3), though the seduction does not result in child-birth. Where the daughter leaves the parental service to engage with her seducer with intent to permit immoral relations, *Evans* v. *Walton* (3) might also plausibly be invoked. I confine myself, however, to intention at time of employment. The circumstances may be various: (*a*) the hiring may be on a mere pretence of service, the supposed master not wanting a servant at all and intending to seduce en route or on arrival in a strange city; (*b*) the hiring may be for the purpose of seduction, but there may be a real post to fill, and the girl, having entered on her duty, at last succumbs to her employer; (*c*) the girl may undertake the proposed service with her eyes open to the immoral intention, with which she is prepared to comply, in which case the contract would be vitiated throughout.

In most cases, at least in Ireland, the young person whom it was planned to seduce would be taken into actual service, as no

(1) 2 Starkie, 493. (2) [1917] 2 I. R., at p. 71.
(3) L. R. 2 C. P. 615.

decent girl with any pretensions to modesty would come where there was no apparent duty and the illicit object might be obvious; besides, an employer would be unlikely to defy public opinion by introducing a maid into his home without any visible functions to discharge, and as his manifest mistress. The contract may be of two kinds. Made between the girl and her master, without wrongful intention on her part, it would be perfectly valid. If she resisted her employer's wicked proposals, the contract would be unimpeachable ab initio. If she ultimately yielded, it would be valid as to the antecedent period, and might remain so, unless the continuance in employment was attributable to immorality as part of the consideration. And, in any case, the sin once committed might never be renewed, from repentance or otherwise. Sexual fault is sometimes the result of surprise, and may be the subject of lifelong sorrow. The other form of contract is where the parent, as head of the family, hires out his child as subject to his disposition and control. In such case (of which the present action is an example) the violation of the father's right carried out under cover of a contract believed by him to be honest, but contrived to carry out a vicious purpose, would be manifest.

I now take up *Speight* v. *Oliviera* (1), the centenary of which, decided in 1819, is celebrated in this action. Reproduced in text-books, cited with approval in cases such as *Griffiths* v. *Teetgen* (2) and *Evans* v. *Walton* (3), followed in *Morgan* v. *Molony* (4), and accepted as settled law by Palles C.B. in the case stated by him in *Gladney* v. *Murphy* (5), and in *Dent* v. *Maguire* (6), the decision must be applied whenever the facts warrant. It has been contended that the principle there laid down is confined to a case (*a*) where there was no real contract of hiring, (*b*) where the sole motive of the employer was to get possession of the girl without any intention to utilize her services before the seduction was successfully accomplished or afterwards. The case is a shocking example of deliberate villainy of a kind described in the eighteenth-century novel. The plaintiff's daughter, twenty-three

(1) 2 Starkie, 493.
(2) 15 C. B. 344.
(3) L. R. 2 C. P. 615.
(4) I. R. 7 C. L. 240.
(5) 26 L. R. Ir. 651.
(6) [1917] 2 I. R., at p. 71.

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years of age, made her own contract with Oliviera, who, after some preliminary falsehoods, engaged her to act as caretaker of his empty house at the modest wage of 7*s.* a week—a figure which would not suggest to her or anyone else vicious design. She remained in that apparently honest position for some months, receiving her weekly stipend under a contract which, so far as she was concerned, was real and enforceable. While in his house, the defendant did not succeed in his design. He then brought her to a brothel, where he effected her ruin. The circumstances are not disclosed in the report—how she was trapped into the den of infamy, where, penniless and desperate, she had to yield; or whether drugs or intoxication overcame her; or whether, gradually depraved in the society and under the influence of the owner of the establishment and her female staff, she ultimately gave way; or what instructions for her reception were given by Oliviera. That her master did not succeed in his own vacant house, and selected a brothel for vanquishing her virtue, points to a diabolical conspiracy, the success of which in a harlot's home might probably consign the unfortunate creature to professional prostitution.

There being a valid contract of service on which, made in good faith, the girl was entitled to be paid her wages, and, if necessary, to sue, what the Lord Chief Justice had to consider was whether the hiring could be regarded as real as against the father, it being an immoral contrivance on the defendant's side. The Chief Justice held that the engagement, if made with intent to seduce, would not put an end to the service with the father, and that the relation of master and servant was never contracted. As against the father, which was the question before the jury and the Judge, this was clearly so; and the girl might have treated the hiring as thenceforth void when she discovered the master's guilty intent. After she fell, her parent was entitled to treat his right of service as unaffected by a contract which was founded from the beginning on immoral object. The defendant could not be allowed to use a contract, based on what was in his own intention turpis causa, as a real contract, defeating the plaintiff's rights. If the purpose had been avowed, the contract would have been illegal, and incapable of confirmation. The guilt of Connell, in

its moral aspect, may be much less heinous than the wickedness of Oliviera; but, in a legal point of view, the present case is stronger, the father making the contract in person, the contract being designed between master and servant to cloak sinful intimacy, and from the youthfulness of the female. A lawful contract induced by fraud is voidable only; but the defendant's side of the contract, here and in *Speight* v. *Oliviera* (1), was vitiated in origin, and void from the immoral design. He could never rely on it as having any legal force whatever. It was incapable of ratification.

The secrets of the heart are hid from mortals, and where a man personally engaged a female servant, afterwards seduced by him, a jury with knowledge of the impulses of erring mankind must usually arrive at a conclusion from inferences drawn from conduct, circumstances, and probability. At a time in our law when a party was not a competent witness the situation was more difficult, but direct evidence of the litigants is too often untrustworthy in sexual controversy.

There was no objection to the Chief Justice's charge when the answers were returned. It was not suggested that they were ambiguous or uncertain, or entitled the defendant to verdict and judgment; and no stay of execution was asked. It is now argued that the addition after "yes" in the third answer, "and also as a domestic servant," shows that there was an effectual, not sham or illusory, contract of service; that the defendant acted from a mixed motive; and that the case is not therefore governed by *Speight* v. *Oliviera* (1). For reasons already indicated I think the contention must be rejected. It is impossible to analyse motives. If Mary Anne had been unfit for work on the one hand, or on the other had declined to act in loco uxoris, she possibly might not have been engaged. From the order of answer, "yes" placed first, the sexual function may have been regarded as supplying the predominant motive in the mind of the lonely widower. The relative proportion and interaction of motives producing will it is impossible to estimate. His intention as to sexual service was fulfilled. The addition after "yes" was possibly made by the jury by way of moral mitigation. He intended Mary Anne to occupy a double position, combining work with pleasure, just as an article of

(1) 2 Starkie, 493.

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utility may be purchased for its additional attractive appearance. She was not to be an idle, lazy instrument of mere enjoyment. She may also have been recommended in his eyes by knowledge that previous intercourse had not been followed by conception, with consequent exposure and scandal. In *Gladney* v. *Murphy* (1) (where in the case stated the Chief Baron referred to the doctrine) the girl had been twenty-one months in the defendant's service. The Judge there held that wicked intent was not proved; but it never occurred to that acute and learned lawyer that if such intent had in fact existed, actual service would have been an answer to seduction accomplished in pursuance of the original guilty purpose of hiring. But the present case in legal quality (though not in its moral aspect) is beyond and much stronger than *Speight* v. *Oliviera* (2). It was the plaintiff who made the bargain, as entitled to direct his daughter's service; he never would have let her go to Connell if he had heard of this latter's purpose, as Connell well knew; Mary Anne was probably a minor; whether she was or not, the new hiring was entered into with the common intention that the clandestine connexion should be continued, so that as between her and her apparent master the contract was of no legal force. She could not have recovered wages earned in part by the unlawful consideration of concubinage. In *Evans* v. *Walton* (3), if the defendant had seduced Louisa Evans before she left her father's house, he would have been equally liable for taking her away by his fraudulent device. Mary Anne while disengaged was her father's servant (which is not disputed). She was got from him under a contract of pretended honest employment intended to be used, and in fact used, for guilty intercourse. Such contract cannot defeat parental rights any more than the fabricated letter in *Evans* v. *Walton* (3), or the contract in *Speight* v. *Oliviera* (2), valid in law (as regarded the girl) though that agreement was in its inception. In both *Evans* v. *Walton* (3) and *Griffiths* v. *Teetgen* (4) the parent directly took part in the transaction, and Maule J. adverts to this in the latter case.

The remaining points may be shortly disposed of. The form of pleading in *Morgan* v. *Molony* (5) was not adopted. The claim

(1) 26 L. R. Ir. 651.
(2) 2 Starkie, 493.
(3) L. R. 2 C. P. 615.
(4) 15 C. B., at p. 346.
(5) I. R. 7 C. L. 101.

followed the old invariable form on which *Speight* v. *Oliviera* (1) was tried. In *Morgan* v. *Molony* (2) the defendant's counsel attempted to set aside the special count; the Court refused the motion, but considered the count unnecessary. Supposing that under our present system of pleading special averments of immoral intent were desirable or necessary, their absence from the pleading furnishes no ground for upsetting this verdict. The defendant knew of the case he had to meet before his defence was opened; no additional evidence could have been given. The Chief Justice allowed the issue to be tried without any formal amendment (which he thought unnecessary), and which otherwise he would have doubtless allowed. An amendment at any stage may be made to give effect to the rights of the parties when clearly and finally ascertained by proof or findings: *Cropper* v. *Smith* (3) *Fisher* v. *Nation Newspaper* (4). The principle that the Court should do complete and final justice when the facts are certain is lucidly explained by Lord Atkinson in his speech in *Banbury's Case* (5).

The final objection on behalf of the defendant is that the damages must have been assessed on a wrong principle, and contrary to the Judge's instruction. The jury at first found £50, and that the defendant was to maintain the child for fourteen years. Having had the legal position fully explained, after consideration, they altered the £50 to £150. The Chief Justice considered that his direction was not disregarded, and is not dissatisfied with the verdict in any respect.

The damages may seem in the circumstances large, but they are not so excessive as in this class of case to justify interference unless there was error in principle. The action has long since been transformed in character from one to recover for loss of actual service estimated at its money value into one founded on constructive service, where damages are allowed for injury to the parent of a more general character: *Murray* v. *FitzGerald* (6); *Dent* v. *Maguire* (7). That the illegitimate offspring lives and does not perish at birth is an element which cannot well be put

(1) 2 Starkie, 493.
(2) I. R. 7 C. L. 101.
(3) 24 Ch. D. 305.
(4) [1901] 2 I. R., at p. 485.
(5) [1918] A. C. 626.
(6) [1906] 2 I. R. 261.
(7) [1917] 2 I. R., at pp. 64, 65.

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aside. A father animated by love for his erring child and by Christian charity will not turn her out on the streets and consign her babe to the workhouse. Her ability to get employment might be affected by her lapse, and her parent might have to support her, at least as matter of moral duty. I respectfully concur in the view of Blackburn J., in *Terry* v. *Hutchinson* (1), where he says that the jury cannot well exclude the cost of maintenance though there is no legal obligation to maintain; and that there is a living memorial of disgrace in a bastard grandchild must be considered. I have always been influenced by this consideration in assessing damages in seduction appeals at Assizes. Having regard to the Chief Justice's report, I think the objection fails. When the jury retired they were at liberty to reconsider the whole case in all its aspects, and did so.

The verdict accordingly, with which the Chief Justice is not dissatisfied, arrived at after careful consideration by a competent jury, must stand, and the motion will be dismissed with costs. It is not therefore necessary to consider whether if the action, so far as based on *Speight* v. *Oliviera* (2), had failed, the plaintiff might not be entitled to a new trial if *Rist* v. *Faux* (3) could be relied on, notwithstanding that before the Lord Chief Justice that view was not presented.

PIM J.:—

I cannot agree with that portion of my brother Gibson's judgment which decides that the decision in *Speight* v. *Oliviera* (2) applies to this case. Otherwise there is no disagreement between us, and I do not formally disagree with the judgment.

Solicitor for the plaintiffs: *Timothy O'Shea.*
Solicitor for the defendant: *John J. Lenehan.*

H. J. M'C.

(1) L. R. 3 Q. B., at p. 603. (2) 25 Starkie, 493.
(3) 4 B. & S. 409.

LYNAM AND OTHERS *v.* DUBLIN UNITED TRAMWAYS COMPANY (1896), LTD. (1).

K.B. Div. 1919.

April 30. May 6.

Appeal.

June 26, 27.

Negligence—Collision—Joint negligence of driver of tram and driver of coach—Questions for the jury.

The plaintiff sustained personal injuries in a collision which took place between a hired coach in which she was travelling, and the driver of which was not under her control, and a tramcar. In an action for damages against the tramway company, the plaintiff alleged, amongst other acts of negligence on the part of the driver of the tramcar, that when he became aware of the plaintiff's danger he took no steps to avoid causing injury. In answer to specific questions put to them at the trial, amongst others, the jury negatived negligence on the part of the driver of the tramcar, and found negligence on the part of the driver of the coach, and that the accident was caused by such negligence; but no question relating to the joint negligence of the two drivers was left to the jury, the learned Judge at the trial in his report stating that he refused to put this question, as he considered it would confuse the jury, and that having so refused, he did not discuss with the jury the question of joint negligence. On these findings judgment was entered for the defendant company.

On an application by the plaintiff for a new trial,

Held, by the Court of Appeal, affirming the decision of the King's Bench Division, that a specific question relating to the issue of joint negligence ought to have been left to the jury, and that there should be a new trial of the action.

TRIAL OF ACTION.

These actions were tried as one action before Kenny J. and a special jury of the county of the city of Dublin on the 19th and 20th days of February, 1919. They were brought to recover damages for personal injuries sustained by the plaintiffs, who were passengers in a coach returning from a funeral, by reason of a collision between it and a tramcar of the defendants on Drumcondra Road, in the city of Dublin.

The coach, which was the property of a person, not a party to the actions, was let out on hire to the plaintiffs, and was driven by a servant of this person at the time of the occurrence.

(1) Before GIBSON and DODD JJ.

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The questions submitted to the jury and their findings were as follows:—

1. Was the driver of the tramcar guilty of negligence? Answer, "No."

2. If so, did such negligence consist in—(*a*) Not keeping a proper look-out? (No answer.) (*b*) Starting the tramcar at an excessive speed? (No answer.) (*c*) Not giving warning of approach? (No answer.) (*d*) Not applying the brake in time? (No answer.)

3. Was the collision caused by such negligence (if any) on the part of the tram-driver? (No answer.)

4. Was the driver of the coach negligent? Answer, "Yes."

5. If so, was the accident caused by such negligence on the part of the driver? Answer, "Yes."

6. Assess damages (if any)? (No answer.)

The learned Judge in the course of his report says:—

I read the questions I propose to ask the jury.

Murphy K.C., for the plaintiff, asks me, on the authority of *Mathews* v. *The London Street Tramways Co.* (1), to add the following question:—"Did the negligence of the motor-man in whole or in part cause the accident?" and submits that no question as to negligence of the coach-driver should be put. The *Bernina Case* (2) was referred to.

Serjeant Sullivan K.C. strongly opposes my leaving the questions suggested by Mr. Murphy, and asks me to leave the questions as I drafted them, on the ground, as I understood, that the strength of the defendants' case was that the accident was attributable solely to the negligence of the driver of the coach; that there was no negligence on the part of the motor-driver; and that he wished to have a finding as to the former's negligence as well as to the negligence of the motor-man. I thought that Mr. Murphy's question would only confuse the jury, and I refused to put it; and, having refused, I did not discuss with the jury the question of joint negligence.

(1) 58 L. J. K. B. 12. (2) 13 A. C. 1.

Mr. Murphy handed in the following written objection to my charge :—

"*Lynam* v. *Dublin United Tramways Company.*

"I respectfully submit that if your Lordship put the question in the form as to which I have objected, your Lordship should add a question of joint negligence.

"I respectfully object to your Lordship's charge on the ground that your Lordship did not give any direction to the jury on the question of joint negligence.

"I ask your Lordship to direct the jury that if they are of opinion that the accident would not have happened but for the negligence of the motor-man and the mourning-coach-driver, the plaintiffs are entitled to a verdict."

The jury found that the tram-driver was not guilty of negligence, and I directed a verdict for the defendants.

I approve of the finding, and I may add that, while I did not discuss the question of joint negligence with the jury, I called their attention to the necessity of discriminating between negligence in the abstract, which was unattended with consequences, and actionable negligence. I think the jury fully understood that in replying to question 1 they were acquitting the motor-driver of all blame in the matter. I gave judgment for the defendants.

The plaintiffs based their application for a new trial on the following grounds :—

1. That the finding in answer to question 1 was made without evidence and against the weight of evidence.

2. That the findings in answer to questions 4 and 5 were made without evidence and against the weight of evidence.

3. That the learned Judge should have submitted to the jury the questions asked for by the plaintiffs' counsel.

4. That the learned Judge failed to give any directions to the jury on the legal effect of joint negligence, and that the findings of the jury were based on such non-directions.

5. That the learned Judge should have submitted a question as to joint negligence.

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6. That the trial was unsatisfactory, as the attention of the jury was not directed to the proper issues in the case.

The facts and arguments appear sufficiently from the judgments.

Hanna K.C., *E. S. Murphy K.C.*, and *Murnaghan*, for the plaintiffs.

Serjeant Sullivan K.C., *Lynch K.C.*, and *Collins*, for the defendants.

Cur. adv. vult.

GIBSON J.:—

This is the first occasion in this Court since *The Bernina* (1) that it becomes necessary to consider and decide as to the method of trial of a passenger's action for negligence. Before discussing the charge, questions and answers of the jury, I shall say a few words on the broad principle involved.

Where injury is inflicted on a person by a collision between vehicles over neither of which does he possess control or ownership, he may go against the owners of each vehicle as jointly responsible, and if only one is found guilty he gets full damages against him; and possibly, if the acquitted defendant was properly joined as matter of precaution, the plaintiff might be allowed to add the costs which he would have to pay the successful defendant, and recover the same against the defeated defendant. The plaintiff, however, might prefer to attack only one of the vehicles, and in that case, if causal negligence was established, could get a verdict against the named defendant, notwithstanding that the other vehicle not sued was more in fault. This course, which, as Lord Justice Lindley observed in *The Bernina* (2), wears an appearance of hardship, was acted on in *Devlin's Case* (3), where Quee was the more negligent of the two drivers, so that when the case was tried by my brother Dodd, the jury, who found for the plaintiff, wished to apportion the damages according to culpability, which, of course, was impossible, even if the owners of the two vehicles had been sued together.

Where the injured person is a passenger, particularly an inside passenger, in one of the colliding vehicles, he would naturally rely

(1) 13 A. C. 1. (2) 12 P. D., at pp. 89-90.

(3) [1907] 2 I. R. 437.

on his driver's account, and would proceed against the owners of the other vehicle as culpable; but if it turned out on the evidence that his own driver was in fault by commission or omission, he would still recover if the driver of the other vehicle, however innocent in the early stages, could by reasonable care have averted the ultimate disaster.

Where (as here) each owner seeks to fix by his driver's testimony the responsibility on the other, the passenger who has no direct concern with that controversy is entitled to require the Judge to instruct the jury as to the differential rights of a passenger; the jury might otherwise think that the case was to be dealt with as a fight between the two drivers, as it formerly was, and as in a popular point of view it might be still considered by lay members of the public. The jury should have clearly before them the legal situation: that both the drivers may be to blame, and that an omission to avoid the consequences of the plaintiff's driver's negligence may be causal negligence entitling the passenger to a verdict. The words "cause" and "caused" lend themselves to misunderstanding; omission on the part of the defendants may be a coefficient in the result, though the predominant blame may be on the passenger's own vehicle, and it may be the striker.

I now take up the pleadings and proof. The action was for damage from negligent driving and management of defendants' tramcar, the particulars being—1, omission to keep a proper look-out; 2, starting at excessive speed; 3, not sounding a bell; 4, not taking steps when the driver became aware of plaintiff's danger to avoid causing injury; 5, improper construction of the brakes. Of these, on the course of the trial, the most important was No. 4. It indicates that the plaintiff relied on *The Bernina* (1) from the start. Breslin, O'Neill's driver, represents that when he was actually crossing or near the tram line the defendants' car started and drove into him, the driver Keogh having his head down and not observing Breslin's approach. Breslin whipped his horses to get clear. The jury have found that Breslin's negligence caused the accident; what the exact negligence was is not specified in the question. I assume that it was crossing close in front of a tram starting and in motion. Keogh says that as he moved he

(1) 13 A. C. 1.

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saw the coach. Breslin came on and whipped his horses, calling on Keogh to raise his head. He saw Breslin was making across the tracks. Keogh did not put on the brakes hard at first, but did so in two or three yards from the collision. Perusal of the written evidence rather suggests the impression of combined fault occasioning the collision. The Judge who heard the witnesses thought that Breslin only was to blame, and the frame of the questions may have been influenced by that view. The allegation that Keogh was holding down his head at a critical period is not an afterthought, for Keogh admits that Breslin charged this before the vehicles were in collision.

At the close of the evidence the crucial question from the plaintiffs' point of view was whether Keogh was to blame, at least in part, for not avoiding the smash.

The Judge prepared questions for the jury, specifying the supposed acts of negligence on the part of Keogh, but not putting a separate substantive question on the 4th paragraph of the plaintiffs' particulars. The nature of the case made it, I think, essential that special attention should be focussed on the duty of Keogh to avoid consequences. Negligence on the part of Keogh was negatived generally, and from the form of the second question the special heads of possible negligence were not, nor was the third question, answered.

Mr. Murphy asked that a question should be added: "Did the negligence of the motor-man in whole or in part cause the accident?" and he objected to any question of the coach-driver's negligence being put. No doubt the issue to be tried was whether the defendants' conduct was wholly or in part directly the cause; and the inquiry as to Breslin's was calculated in the circumstances to make the contest seem one between the respective charioteers; but with a proper direction I do not think the question as to Breslin would have been objectionable. Serjeant Sullivan, for the defendants, treated it as the fundamental and decisive question to determine liability. At the same time it may be inconvenient that a person not party to the litigation should be by name convicted of negligence in his absence. In *Devlin's Case* (1) this was, however, done.

(1) [1907] 2 I. R. 437.

The Judge considered that the issue of joint negligence would only confuse the jury, and, having refused to put any such question, he did not discuss it with the jury. With deference, I am unable to see how the question would have confused the jury, and I think that the essential issue was on the fourth head of the plaintiffs' particulars. Counsel was entitled to demand that the jury should be fully instructed as to the plaintiffs' position and rights. Mr. Murphy accordingly objected to the charge on this ground, and asked the Judge to direct that if the jury were of opinion that the accident would not have happened but for the negligence of the motor-driver and the coach-driver, the plaintiff was entitled to a verdict.

In my opinion the Judge erred in not giving this instruction to the jury. Serjeant Sullivan urged that what he called a lecture on law would only tend to mislead in dealing with matters of fact; that a Judge was entitled to formulate for himself the proper questions for determination, and he contended that the questions put were proper for the purpose. Without, however, restricting the function and duty of the Judge, I would point out that under sec. 48 of the Judicature Act (so often overlooked and not referred to in the argument before us or in *Devlin's Case* (1)) a proper and complete direction upon the law and the evidence applicable to the issues is required. Our present practice does not require this right to be enforced by bills of exceptions on parchment, of which in former days counsel used to take a supply round on circuit. On the old issue of "not guilty" the refusal of my brother Kenny could have been successfully impeached on exceptions. The separation of the questions under our present practice does not justify the Judge in declining to give a complete direction upon the law as well as the evidence. In the case of a passenger, it would be pre-eminently necessary to do this, as the jury, if so instructed, would then approach the issue from a different angle from that which they would have to deal with if the controversy was between opposing coachmen. The third question in *Gaffney's Case* (2) cannot be safely omitted, as is shown by the answers of the jury in that case, and by the convincing and elaborate judgment of Lord Justice Ronan, where all the authorities are luminously

(1) [1907] 2 I. R. 437. (2) [1916] 2 I. R. 472.

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analysed and reviewed. To mix up the distinct and fundamental question of duty to avoid consequences with questions as to antecedent specific acts of negligence tends to convey to the jury that the battle was between the Jehus. The nature of the liability to the passenger might thus be obscured. The danger of this omission is strikingly illustrated by *Devlin's Case* (1), where, though the jury disagreed as to the negligence of defendants, this Court held that on the further answers the defendants must succeed. The forcible judgment of FitzGibbon L.J., and the result of the second trial, show how vital it is that the possible share of the defendants in the ultimate result should be explained and presented to the jury for particular attention. The judgments of Lindley L.J. and Lord Esher in *The Bernina* (2), and of Lord Herschell in 13 A. C. 1, with the reasoning of FitzGibbon L.J. in *Devlin's Case* (1), and Ronan L.J. in *Gaffney's Case* (3), strongly support my conclusion. I may add the instructive observations of Lord Sumner in *Loach's Case* (4) as to ultimate fault.

It is, however, urged that the jury have by their answers completely acquitted Keogh, and found Breslin alone guilty. The form of the questions prevented the second and third questions—the latter peculiarly important—from being answered; the fourth question does not describe the negligence complained of, the nature of this being, I suppose, treated as obvious; and the fifth question does not use the term "exclusively." The questions are much the same as if O'Neill had been plaintiff, but omitting (adversely to the plaintiff) inquiry as to ability to avoid, though it went to the root of the action: *The Bernina* (5). The order of questions 1 and 2 is wrong. They should have been transposed. Assuming in defendants' favour that the answers might have been sufficient to entitle defendants to a verdict had the law as to passengers' rights been adequately explained, and had special consideration been directed to the paramount issue whether Keogh could not by reasonable care have averted the accident, however negligent Breslin may have been, which issue should have been separately and distinctly put, I am of opinion that the

(1) [1907] 2 I. R. 437.
(2) 12 P. D. 57.
(3) [1916] 2 I. R. 472.
(4) [1916] A. C. 719.
(5) 12 P. D., at p. 89.

findings and verdict cannot be allowed to stand. No verdict can be regarded as satisfactory when the right given to the suitor by sec. 48 of our Judicature Act, introduced to control the Judge, has been disregarded, and the suitor may have been thereby prejudiced. In England the situation, where a Judge has failed adequately to bring before the jury the law and considerations determining litigants' rights, has been frequently dealt with at the civil as well as at the criminal side. As to the weight of evidence, I say nothing. At the new trial, the most important issue, one which must be distinctly put, will be whether, if Breslin was negligent, Keogh could by reasonable care and skill have avoided the consequences. On the findings this issue appears undetermined.

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The findings and verdict must be set aside, and a new trial directed. The defendants must pay the costs of these motions (treated as one motion) as in *Devlin's Case* (1), and the costs of the first trial will abide the final result.

DODD J.:—

The plaintiffs in these actions were in a coach returning from Glasnevin, after a funeral, on Sunday, the 20th of October. The coach was driven by a driver, John Breslin, in the employment of O'Neill & Company. It returned via the Whitworth Road, where it stopped to let a lady out, and then proceeded across the tram lines. While crossing them it was struck by a tramcar coming down the slope. I refrain from details at present. The ladies in the coach were all hurt, some of them seriously, one of them not so seriously.

The action was brought against the tram company alone, and not against the owners of the coach. It resulted in a verdict for the defendants. That verdict and the judgments founded upon it are now challenged.

Counsel for the plaintiffs submitted a question which the Judge declined to put. He put questions to which counsel for the plaintiffs objected, and declined to tell the jury what counsel for the plaintiffs submitted was the law upon the matter. The finding of the jury on question 4 is also challenged.

(1) [1907] 2 I. R. 437.

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The case presented by the plaintiffs, as they were dependent upon the evidence of the driver of the coach, was one that tended to throw the whole blame upon the tramcar. There was one averment in the pleading, overstated no doubt, "that the driver when he became aware of the plaintiffs' danger did not take any steps to avoid causing injury to the plaintiffs," which did raise an important issue—the most important, as I think, in the case.

So far as it is necessary for our present purpose, I think it well to set out the evidence of the coachman.

John Breslin, the driver of the coach, said—"On Sunday, 20th October, I was driving the coach (from Glasnevin along Whitworth Road) to Drumcondra Road, and then to go up Dorset Street. Stopped to let a lady out. John M'Cabe was sitting beside me. As I came out on Drumcondra Road I saw the tramcar stopped on top of bridge. After letting the lady out, I was crossing to the right-hand side of the road, that is, to the left-hand side of the Drumcondra Road. I was walking the horses across the line. Just as I had the horses clear of the line I saw the tram starting. The driver had his head down." [The Judge explains. Witness shows position: only head bent a little.] "I whipped the horses up. M'Cabe shouted and so did I. The driver did not appear to hear. It was impossible to get clear, M'Cabe said to driver. He had his head down when he started the tram. Driver said nothing . . . Nothing to obstruct driver's view if he had his head up. He had time to see me and prevent the accident." And on cross-examination he stated: "When he started, my horses were clear of the near tram line."

M'Cabe's evidence was to the same effect, and there was other evidence.

The motor-man's account is as follows:—"Compulsory stopping-place on top of bridge. Got bell to start; did not start. Child ran across; then started. Saw, as I moved, the coach moving on its left side, crossing the footpath across road. He was crossing the path; I was moving very slowly. As Breslin crossed the crossing he whipped up the horses. He whipped them again on the unpaved part of Drumcondra Road. The horses were trotting. He came on, whipping the horses, and calling me to raise my head. He was five or six yards off when he pulled on to my

track. I did my best to pull up my car as quick as possible. Just as the car came to a stop he hit (*sic*) the car. I did not go an inch after striking him. I could have done no more." In cross-examination he added: "From bridge, and saw coach moving . . He headed skew-ways. I had to pull up short on top of bridge, partly on top, as two other vehicles were coming across me out of Whitworth Road. I put on my brakes slightly first. I saw he was making across the tram tracks. I sounded gong when I started, not after. I was using my right foot on brake. I use my right foot on gong; but that I was so busy at the brake with my right foot, I would have sounded the gong. When he was at the crossing I was holding the brakes ready . . . When he whipped up the second time I put on the brakes, but not hard. He was then four or five yards away. My tram was going at less than one mile an hour. I could not pull up the car in less than half its length. When he whipped up the second time the shout came from the coach. I then put on the brakes hard. He then came on the sets. I could not tell what he was going to do. In two or three yards I pulled up hard. It was the door of the coach struck me. I won't deny he may have said 'you had your bloody head down.' I did not hear it. I said not one word."

Before examining the directions, and the questions put to the jury, let us endeavour to find out what the issues raised by this evidence were, in fact, in everyday language. The coach-driver says, "You ought to have seen me. I took it for granted you would see me. Your tram was at a standstill on the top of the bridge when I started to cross. You had your head down, or you would have seen me. I whipped all I knew to get across after you started. You even then made no effort. You did not put on the brakes. Your head was still down. I whipped again. You hit me."

The motor-man says, "You came across from your wrong side askew. You should have seen the tram moving. You should not have attempted to cross in front of it." He says he saw the coach-driver when he commenced to cross the footpath. The suggestion apparently is that the coach should have stopped. The coach suggests the tram should have stopped. It was apparently a struggle between them for the fair way.

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Yes, but what about the ladies? Is their safety to be imperilled? Assume that the driver of the coach was guilty of negligence, and even of negligence that would debar his employer from having redress, as the representatives of Owen were debarred in the *Bernina Case* (1), if the driver of the motor-car could by the exercise of reasonable care have avoided the collision, they are entitled to a verdict. That issue, therefore, should go clearly to the jury, whatever other issues went, accompanied, too, as I think, with suitable explanations from the Judge.

The answers to the questions that were put may determine an issue between the coach and the tram, but whether the claim of the plaintiffs against the defendants is concluded by them is another matter, and requires consideration. The application before us seeks to set aside some of the findings. That also must be considered.

Counsel for the defendants urge, and the Judge says that the jury in replying to question 1 were acquitting the driver of all blame. Question 1 is: "Was the driver of the tramcar guilty of negligence?" The answer is "No." That question is put in the form of the general issue. This lies at the threshold. The jury give a clean acquittal, "not guilty." They do not answer any of the sub-questions on the second question. We can have no assistance as to what the jury considered before they gave such a finding, or that they considered any of the matters suggested by the Judge in the second question as being possible elements before arriving at an answer to the first question. It would seem as, having answered 1, they did not consider 2 at all. But taking it in its most favourable form, that they did consider the sub-questions, and that "no answer" means "no," those sub-questions do not direct the attention of the jury to the cardinal question—a question, too, covered by the particulars, though over-covered: Did the driver, when he became aware of the plaintiffs' danger, take any steps to avoid causing injury to the plaintiffs? I prefer to put it: "Could the motor-driver, by the exercise of reasonable care, have avoided the consequences of the negligence of the driver of the coach in crossing in front of the tram?" I assume that is the negligence found in answer to the

(1) 12 P. D. 57.

fourth question: "Was the driver of the coach negligent?" What the negligence found against him is is not set out. But, it is said, the whole thing is determined by the answer to the fifth question: "Was the accident caused by 'such' negligence on the part of the driver?" The answer is "yes." We shall have to inquire whether that answer is conclusive against the ladies.

Avoiding, as I do, anything in the way of parsing the questions, we have two findings on which, and on which alone, the defendants would be entitled to hold their verdict and judgment. The driver of the tram was not guilty of negligence. The driver of the coach was guilty of negligence, and the accident was caused by such negligence on the part of the driver of the coach.

The notice of motion seeks to set aside the finding in answer to question 1 as being made without evidence and against the weight of evidence. If necessary, I think that finding should be set aside. The plaintiffs were entitled to have, not an issue acquitting the defendants of negligence in the abstract, but a specific finding that the defendants' driver did take due care to avoid a collision. The Judge's attention was specially called to it: firstly, by the particulars, and, secondly, by Mr. Murphy, who asked the question to be put. Negligence is breach of duty—breach of duty to the plaintiffs. He did not tell the jury what the duty of the defendants to the plaintiffs was. That duty is clearly set forth in Lord Justice FitzGibbon's judgment in *Devlin's Case* (1). He summarizes the law, and does so in words which he adapts from Sir Frederick Pollock's work, Pollock on Torts, and continues: "This being the law, it is well, before referring to the facts, to define the duty to the plaintiff, who was lawfully using the footpath, of those who were driving vehicles at right angles to each other towards the intersection of the streets where the collision happened. At the trial, attention does not appear to have been called to the identity of this duty, as resting on the drivers of both 'trap' and 'tram.' Each was bound to drive at a reasonable speed, and as he approached the cross-streets, to see that no person or vehicle was coming dangerously near from the other direction. Each driver was also bound to have his vehicle under such control as would

(1) [1907] 2 I. R. 437.

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enable him to pull up in time to avoid a collision with any person, vehicle, or thing which he might reasonably expect to see as the other street opened to his view. A runaway horse, a straying child, or a drunken man was as much to be avoided, if reasonably possible, as any other object, including a reckless driver." And at page 459 he says: "I am clearly of opinion that the case must be sent to a new trial, because it has not yet been found whether the plaintiff was injured solely by Quee's negligence, solely by the negligence of the tram-driver, or by the combined negligence of both—one precipitating, and the other failing to avoid, the collision which injured the plaintiff."

Mr. Murphy's objection to the charge raised, in an unobjectionable form, the precise point. He objected to the form of the questions. If the Judge did put them, Mr. Murphy asked him to add a question of joint negligence. He objected that the Judge did not give any opinion to the jury on the question of joint negligence. He asked the Judge to direct the jury that if they were of opinion that the accident would not have happened but for the negligence of the motor-man and the mourning-coach-driver, the plaintiffs were entitled to a verdict. The Judge says he did not discuss the question of joint negligence with the jury. I think this was an error. As between the coach and the tramcar the jury may have thought the preponderating negligence was on the part of the coach. But the duty of each to the ladies was never alluded to. The Judge says his reason for not doing so was that such a discussion might confuse the jury. I am clear that in the absence of guidance from the Judge they were liable to go astray, and treat the whole matter as one between tram and coach; and the rights of the ladies and the law regulating their rights were not "discussed." And, with all respect, I think the matter he did call attention to—"the necessity of discriminating between negligence in the abstract, which was unattended with 'consequence,' and actionable negligence," whatever applicability the proposition may have in another set of circumstances—cannot be regarded as a substitute for explaining to the jury in this case (in which, so far as I can see, no such matter arises) the law as to combined negligence by two persons as affecting the

right of the person injured to recover damages from either or both.

The law is clear. The plaintiffs succeed if they satisfy the jury that negligence on the part of the driver was a cause. They do not need to prove it was the cause. The question does not contain an issue upon the only matter in which the plaintiffs were really interested: whether between the two drivers they had been injured by want of due care on the part of both to avoid a collision. There is the more need for discrimination on the part of the Judge, for a jury—I speak from experience—are slow to find against one wrongdoer when they think the matter began with a wrongful act on the part of another wrongdoer, who is not before the Court, and especially if the plaintiffs have to rely on the evidence of the servants of the other wrongdoer. It is almost as of course that a corporation will be sued rather than the owner of a trap or a mourning-coach. They feel a sense of hardship to the defendant in making him pay all the damages, and letting the greater culprit go free. But all this makes it more incumbent on the Judge to see that adequate justice is done. It so happens that the third trial in *Devlin's Case* (1) was before me. I left the question indicated by the Court of Appeal. The jury found that the collision was due to the combined negligences of the trap and the tram. They assessed damages, but asked me, if I could, to apportion them in a certain proportion indicated. I pointed out, as I had already told them, that I had no power. It appears from the judgment of Lord Lindley, then Lord Justice Lindley, that it was this hardship that influenced the Judges in England to invent the fiction of identification of the passenger with the vehicle in which he was being driven—a fiction which *The Bernina* (2) swept aside. I think the Judge should have yielded. He should have allowed the question, and explained the law. I do not see how an accurate statement of the law could confuse a jury. I think there must be a new trial, and I concur in the order as to costs.

H. J. M'C.

(1) [1907] 2 I. R. 437.

(2) 12 P. D. 57.

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June 26.

The defendants appealed to the Court of Appeal (1).

Serjeant Sullivan K.C. and *P. Lynch K.C.* (*Collins* with them), for the appellants :—

The case was fully tried, and as the findings of the jury amounted to a clear verdict for the defendant company, the judgment entered for them at the trial should be restored. The jury has found that there was no negligence on the part of the driver of the tramcar, and that the accident was caused by the negligence of the driver of the coach. These findings are exhaustive, and a further question based on joint negligence would only have puzzled the minds of the jury.

H. Hanna K.C., *E. S. Murphy K.C.*, and *Murnaghan*, for the respondents :—

This action was throughout based on the principle laid down in *The Bernina* (2), and the plaintiff was entitled to have a specific question on the issue of joint negligence left to the jury.

June 27.

SIR JAMES CAMPBELL C. :—

This action was brought by the plaintiff, claiming damages against the defendants, the Dublin United Tramways Company, for negligence. It is unnecessary for me to discuss at length the facts of the case, or to express any view thereon, inasmuch as the judgment of the King's Bench Division, with which we do not see our way to differ, necessarily involves a new trial of the action, assuming that the decision of this Court remains unimpeached. The facts not in dispute are: that this lady and others were passengers in a coach which they had hired, the driver not being under their control, but having been sent by the owner of the coach, and as a result of the negligence either of the driver of the coach or of the owner of the tramcar, or as a result of a combination of the negligence of the two, the plaintiff, as she alleges, was seriously injured.

(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

(2) 12 P. D. 89.

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Serjeant Sullivan, who represented the defendants at the hearing of the action and in this Court, has assured us that his object throughout was to avoid any question depending upon the allegation of partial or contributory negligence on the part of the defendant company, his object being to have the issue solved by confining the jury's attention entirely to one question, namely, whether the defendants were guilty of negligence. Apparently he carried out that determination so far as he could. We find that at the conclusion of the evidence, and when the learned Judge informed counsel as to the nature of the issues he proposed to leave to the jury, Mr. Murphy, representing the plaintiff at the trial, asked the Judge to leave another question which would, and did, in the most pointed way raise the question of joint negligence, and would, if put, have in the clearest way directed the attention of the jury to that question. Again Serjeant Sullivan interposed, as he has told us that he did; and he says that it was in pursuance of his determination, in discharge of his duty to his clients, which he has observed in all cases of this kind, to avoid having any such question put in issue, that he protested against this particular question being put, and Kenny J. yielded to his protest. The learned Judge then proceeded with his charge to the jury, and, after he had finished, Mr. Murphy directed his attention to the fact that he had failed to give the jury any advice on the question of joint negligence; and he also contended that he was entitled to have, if not the first question he asked to have submitted, at least a question directly pointing to joint negligence, namely, "Was the accident occasioned by the joint negligence of the driver of the coach and the motor-man?" Kenny J. refused to put this specific question.

We thus find that Mr. Murphy made several efforts without avail to have a question put, which, with the necessary consequential directions from the learned Judge, would have necessarily directed the attention of the jury to the relevant and material issue in the case. I need not repeat the questions which were put by the Judge, and I shall summarize them merely. In the first place, he asked, "Was the driver of the tramcar guilty of negligence?" There was nothing in this question as to his being solely or exclusively negligent, nor is there any reference to

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negligence in part; it is a direct question: Was he guilty of negligence? To that question the jury answered "No." Having said "no" to this question, they did not answer a number of subsidiary questions, in which the learned Judge asked them, if they came to the conclusion that the defendants were guilty of negligence, in what respect were they so guilty, having regard to certain matters alleged against them, four in all? To these, as I have said, they gave no answer. Then comes the third question: "Was the collision caused by such negligence (if any) on the part of the tram-driver?" That again is not answered; and, as at present advised, I think that the criticism of that question, as being unnecessary in view of the form and frame of the first question, is well founded. Question No. 4 is: Was the driver of the coach negligent? Again, I see no answer to the criticism of my colleague, Lord Justice Ronan, as to that question, namely, that if you contrast it with question No. 1 it is identical in form and substance; and if question No. 4 was intended to, and did in fact, involve the issue of sole negligence, it is difficult to conceive how the jury could have understood the first question otherwise than as meaning the same thing. I do not think it necessarily follows that they did so understand it; but I think we are entitled to say this: that the question as put may have misled them, inasmuch as from the beginning to the end there is no question which in form suggests or raises the issue of negligence on the part of the defendants which contributed to this occurrence.

It might, perhaps, be difficult for us to quarrel with these findings and verdict if the matter depended solely on the inference we were to draw from the frame and form of the questions; but the inference we have drawn is, in my opinion, strongly fortified when we come to consider the short reference made to this question, and in the course of the trial by the learned Judge himself, who certainly has conveyed to us his recollection of what he did say to the jury in a very concise and characteristically frank manner. First of all he tells us that his reason for refusing to put the proper question—because no one can challenge or deny that Mr. Murphy's question was the proper question to determine the matter if it was to be determined at all—was that it would only have confused the jury. At first I was inclined to think that there might be some weight in the suggestion of Serjeant Sullivan

that the putting of a variety of questions in negligence cases such as this is often calculated to confuse the jury, and results in their not understanding the question; but that can hardly be the meaning of the learned Judge, because, assuming that the jury were competent to understand the questions that were put to them, they were equally competent to understand Mr. Murphy's question, which was one of the simplest kind, and in no way more complicated or more likely to confuse the jury than any one of the questions which were put in fact. The learned Judge reports: "I thought that Mr. Murphy's question would only confuse the jury, and I refused to put it, and having refused I did not discuss with the jury the question of joint negligence." That to my mind plainly and clearly tells us that it followed as a logical consequence that it became unnecessary and irrelevant for him to have called the attention of the jury to the legal possibility of there having been joint negligence, the effect of which, if they had found it, would have been to make the defendants liable, although their negligence might only have been an unsubstantial part of the joint contribution, provided that negligence had in part contributed to the happening of the occurrence. Finally, the learned Judge tells us: "I approve of the finding, and I may add that while I did not discuss the question of joint negligence with the jury, I called their attention to the necessity of discriminating between negligence in the abstract which was unattended with consequences, and actionable negligence." That, with all respect, did not get rid of the possibility of a miscarriage owing to his refusal to ask the particular question based on joint negligence; it only indicates that negligence per se is not sufficient, but that it must be actionable negligence, having something to do with the happening of the accident. I cannot myself conclude from that statement that the learned Judge did bring before the jury with sufficient clearness, or in any way that was specific enough to obviate the chance of miscarriage, this serious question, which was certainly involved in the facts of the case; and indeed it is difficult to imagine a case more directly raising on its facts this issue of joint negligence than the present one. For these reasons I am of opinion, in which I believe my colleagues agree, that we ought not to interfere with the decision of the King's Bench Division,

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and that the case should go to a new trial. Taking that view of the case, it is unnecessary to refer to the other branch of the case discussed by Mr. Murphy, as to how far the evidence was satisfactory or sufficient in reference to the jury's answer to question No. 4. If the case is to go to a new trial, the less we say about the facts of the case the better.

RONAN L.J.:—

I am of the same opinion, and for the same reasons. I say nothing as to the verdict being against the weight of evidence, as the case is to be re-tried. As to the other matter, I rest my judgment on the grounds stated by the Lord Chancellor in his judgment, and those stated by the Judges in the Court below.

O'CONNOR L.J.:—

I agree. In my opinion when the jury answered question No. 1 they had not present to their minds that the negligence mentioned in that question might include negligence which, though not the direct cause of the accident, was a contributory cause. My reason for so thinking is this. The learned Judge tells us that "while I did not discuss the question of joint negligence with the jury, I called their attention to the necessity of discriminating between negligence in the abstract which was unattended with consequences, and actionable negligence." In other words, he told the jury that certain negligence they were to regard, and certain negligence they were not to regard. In point of law the jury should have been told that included in the negligence they were to regard was contributory or joint negligence; but the Judge tells us he never discussed the question of such negligence in his charge at all. For this reason and the other considerations referred to by the Lord Chancellor, I am of opinion that the case was not satisfactorily tried, and that the appeal should be dismissed.

Solicitor for the plaintiffs: *Laurence J. O'Neill.*

Solicitors for the defendants: *Casey, Clay, and Collins.*

R. ST. J. C.

The Case was again tried on 3rd and 4th November, 1919, before the Lord Chief Justice and a special jury, who found that the accident was the result of the combined negligence of the motor-man and the coach-driver, and awarded damages.—EDITOR.

MARY LUBE PEART, APPLICANT; AMY L. C. BARRETT, GERTRUDE E. CALWELL, MARY A. CALWELL, HELEN L. CALWELL, IDA E. CALWELL, AND GEORGE P. STEWART, RESPONDENTS (1).

Appeal. 1919. May 16, 19.

Town Tenants Act, 1906 (6 *Edw.* 7, *c.* 54)—*Compensation for improvements — Basis of assessment — Lease — Enjoyment by tenant of improvements—Discretionary power to reduce compensation.*

In 1835 lands were granted by a lease for lives which became vested in M., who, in 1878, granted a sub-lease of the lands to P., and in 1899 assigned his reversion to P. and the applicant. P. subsequently died, when the lease became vested in the applicant solely. The lease terminated by the dropping of the last life in 1915. P., in 1878 and 1879, had erected buildings on the lands, of which the value at the termination of the lease in 1915 was £1800. The resulting addition to the letting value of the lands from 1878 to 1915 was £60 per year. The capital value of that addition in 1915 was £1200.

On a claim by the tenant for compensation for improvements under the Town Tenants (Ireland) Act, 1906,

Held, by the Court of Appeal (affirming the decision of the King's Bench Division), 1, that the enjoyment by the tenant of the advantage of the improvements during the period 1878 to 1915 had not necessarily extinguished her right to compensation, and 2, that the initial figure, being the amount to be allowed for the additional letting value resulting solely from the tenant's improvements, not exceeding the capitalized value thereof as a maximum, was the sum from which any sum representing a reduction of the tenant's claim in respect of the time during which she had enjoyed the advantage of the improvements should have been deducted, and not the sum representing the value of the improvements at the date of the determination of the lease.

This was an appeal by both applicant and respondents from the judgment of the King's Bench Division, delivered on the hearing of the case stated by Pim J., reported ante, p. 190.

Jellett K.C., *Swayne K.C.*, and *Cecil fforde*, for the landlord:—

Under sub-sect. 2 of sect. 1 of the Town Tenants Act, 1906, the Court was bound to take into consideration the time during which the tenant enjoyed the advantage of the improvements;

(1) In the Court of Appeal, before SIR J. CAMPBELL C., and RONAN and O'CONNOR L.JJ.

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the words of the section are enabling words, but these become compulsory where they are to effectuate a legal right: *Julius* v. *Lord Bishop of Oxford* (1). If such time be taken into consideration in the present case, the tenant, owing to the nature and extent of his enjoyment, is not entitled to any compensation, and this result follows from the figures supplied by Pim J. himself, who has found that the increased letting value attributable to the improvements amounted to £60 per annum, and the capitalized value thereof to £1200. This increased letting value of £60 per annum has been enjoyed by the tenant for nearly forty years, and such enjoyment must have extinguished the maximum amount of compensation payable under sect. 1, sub-s. 1, namely, £1200. Enjoyment is compensation pro tanto, or, as in this case, full compensation.

Having regard to the principle of the Act, which deals with increased letting value only, the principal sum from which Pim J. should have made his deduction was £1200, the capitalized value of the increase in the letting value, not £1800, the present value of the buildings.

S. L. Brown K.C., Carrigan K.C., and MacCormack, for the tenant:—

The contention on behalf of the landlords would frustrate the primary object of the Act, which was to compensate a tenant for the improvements effected by him, the value of which passes to the landlord on the termination of the letting. We contend that the clause in sect. 1, sub-s. 2, enabling the tenant's claim to be reduced by taking into consideration the time during which he may have enjoyed the advantage of the improvements, has no application to a case where, as in the present, the premises in which the improvements were effected were held under a lease. In *Adams* v. *Dunseath* (2), it was clearly held that when a tenant, holding under a lease, makes improvements and enjoys them till the end of his lease, his enjoyment thereof is not compensation by the landlord within sect. 8, sub-s. 9, of the Act of 1881. The argument further overlooks the consideration that if the tenant instead of spending his money on buildings had invested it, he

(1) 5 A. C. 214. (2) 10 L. R. Ir. 109.

would not only have received a return for his money in the way of interest, but have remained entitled to the principal invested; here the tenant has lost the principal sunk in improvements. We contend that "improvements" in sect. 1, sub-sect. 1, of the Town Tenants Act bears the same meaning as in the two Land Acts of 1870 and 1881, i.e. "it does not, and cannot, mean the increased letting value of the holding caused by the making of the improvements, but simply the works which have caused that increase, or rather the interest of the tenant who made them, measured by the money expended on them": per Sir Edward Sullivan M.R., in *Adams* v. *Dunseath* (1). It is on this basis that compensation should have been awarded, and consequently, if any deductions are to be made, the Court is not limited to the initial figure of £1200.

Cur. adv. vult.

SIR JAMES CAMPBELL C.:—

This litigation originated in a claim by a tenant for compensation for improvements under the Town Tenants (Ireland) Act, 1906. It came, in the first instance, before the learned Recorder of Dublin, who awarded the tenant the sum of £417, and from this decision appeals were taken by both sides. Upon the hearing of these appeals, before Mr. Justice Pim, he increased the award to £949, but at the request of the landlords stated a case for the opinion of the King's Bench Division upon three specific questions of law. I need not quote these questions, nor is it necessary to repeat the facts, which are fully and clearly set out in the case itself. Of the three questions submitted, one only has been argued here, namely, whether Mr. Justice Pim, on the facts found by him, was bound to dismiss the claim in view of the nature and extent of the tenant's enjoyment of the improvements in respect of which the claim was made. A fourth question was also argued before us, namely, whether the methods he adopted in arriving at his award of £949 were correct in principle. This question was also raised and argued before the King's Bench Division without, apparently, any objection from either side, nor has any such objection been raised in this Court. Inasmuch as

(1) 10 L. R. Ir. 109, at pp. 136, 137.

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the case stated sets forth all the facts and considerations that are essential for its decision, it was a proper subject for review and determination both in the King's Bench Division and on appeal in this Court. It appears that the tenant or her predecessor had during the currency of the lease, which terminated in 1915, erected buildings, all of which were completed in or before 1878, at a cost which Mr. Justice Pim estimated at £1800. He further finds that as a result of this outlay the resulting addition to the letting value of the holding was £60 per annum, which he finds to have been a constant figure for every year from 1878 to the termination of the lease; and he assesses the capital value of this addition of £60 a year to the letting value of the holding at £1200. He then, in paragraph 18 of the case, sets out minutely the method adopted by him in arriving at his award of £949 in the following words:—"I found that at a moderate estimate the present value of the buildings is £1800. I deducted from this the £200 expended under the covenant in the lease, leaving £1600. Taking into consideration that the tenant had paid £10 a year for property worth £15 a year, and had enjoyed the improvements since 1878, but that the tenant's occupation of the improvements has been such as to maintain them in an excellent condition from a letting point of view, I deducted from the said sum of £1600 one-third thereof, that is £533, leaving £1067. There is no method by which an exact figure for this deduction can be ascertained. It is, and remains, a rough estimate. From the time of Lord Longford's death until the 1st day of December, 1917, during part of which period nobody knew whether Lord Longford was dead or not, and during a further part of which negotiations for a sale or new letting of the property were proceeding between the parties, the tenant occupied the holding. For this period, although in a sense she had not remained on against the landlords' will, I charged the tenant £83. In estimating this amount I had regard to the letting value and to the probability that the landlords could have found a tenant. This left £984, from which I have deducted £35, the sum necessary to prepare the premises for letting, and I awarded the tenant the balance, £949, which is much less than the capitalized value of the increase in the letting value attributable directly to the improvements."

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No objection on either side was raised in reference to the deductions of £200, £83, and £35, so it may be assumed that they will not be departed from upon any readjustment by Mr. Justice Pim of the amount of his award consequent upon our decision; but in the King's Bench Division and in this Court it was contended upon behalf of the landlords, first, that in view of the finding by Mr. Justice Pim that the buildings completed in 1878 had increased the letting value of the holding for each year from that date down to the expiration of the lease by the constant figure of £60, representing a capital value of £1200, the learned Judge had by this means mathematically ascertained the measure and value of the tenant's enjoyment; that, accordingly, he was not at liberty to resort to an arbitrary assessment of the value of this enjoyment at one-third of £1800 or of any other sum, but was bound as a matter of law to decide that the tenant's enjoyment of the improvements, as measured by him in moneys numbered, was full compensation for the improvements, and that, therefore, he should have dismissed the claim; and, second, that the methods adopted by Mr. Justice Pim, in so far as they started with the initial figure of £1800 instead of £1200, the capital value of the increased letting value of the holding attributable to the tenant's improvements, were radically wrong. The Court below was unanimous in the opinion that the first of these contentions was unsustainable, but that the landlords were right in their second contention.

The landlords have appealed from the decision on this first question, and the tenant has also appealed from the decision on the second, but in our opinion the King's Bench Division was plainly right in both conclusions. I think it will be more convenient if I deal in the first place with the second of these contentions, going as it does to the very root of Mr. Justice Pim's award. If anything is plain in the Town Tenants Act, it is that no improvement can sustain a claim for compensation under it unless it has added to the letting value of the holding and is suitable; or, in other words, that the subject-matter of compensation is the improvement only in so far as it has increased the letting value, and that accordingly in no case can the amount to be awarded exceed the capital value of this increase. As Ronan L.J.

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expressed it in the course of the argument, the maximum of compensation that could in any circumstances be awarded in the present case, assuming that the buildings had been erected in the year in which the lease expired, would be the £1200, no deduction being possible upon such facts merely by reason of the tenant's enjoyment of his improvements; but where, as in this case, there had been enjoyment to a greater or less degree, such enjoyment must necessarily be the subject of deduction from the £1200, and from no greater figure.

I wish to make it very plain that in taking this figure of £1200 as the maximum of the compensation that could be awarded, I am assuming that Mr. Justice Pim found it as a fact to be wholly attributable to the buildings, because in so far as any portion of it was attributable to the improvability of the land, to amenities other than buildings, such as pleasure grounds, gardens, &c., completed at any period more than ten years before the bringing of the claim, to the development of the district as residential, to railway construction or such like, such portion should in my opinion be treated by way of deduction or discount from this maximum to such an extent as in all the circumstances the Court may think reasonable and just. Mr. Justice Pim has, however, as he has distinctly told us, proceeded upon a wholly different principle, because he has deliberately taken as his maximum not the £1200, but an entirely different figure, namely, £1800, his estimate of the present value of these buildings, and this in the teeth of his express finding that this outlay has only increased the letting value of the holding by the capital sum of £1200. Such a method is palpably wrong, and, as a simple illustration will suffice to show, must inevitably lead in many cases to gross injustice, and stultify the provisions of the Act itself. Suppose, for example, that the present value of these buildings had been fixed by him at £3000 and not £1800, but that the extent to which they had increased the letting value of the holding was still only £1200. Mr. Justice Pim would take this £3000 as his initial figure, and, after deducting one-third in respect of the period of the tenant's enjoyment, the sum of £2000 would remain. Deduct from this £2000 the three further sums in respect of which there is no dispute, namely, £200, £83, and

£35, and we are left with the figure of £1682, which should therefore be the amount of his award. But as the maximum authorized by the express terms of the Act is the £1200, it must follow from this process that no deduction could or would be made from it in respect of the tenant's enjoyment or in respect of the building covenant or the other deductions as to which there is no dispute, and it would therefore be wholly immaterial for the purpose of the calculation whether the enjoyment by the tenant had lasted for a century or a year, nor could effect be given by way of deduction to any of the other three items, inasmuch as the maximum of £1200 would remain intact. I should like to add that I cannot find any authority in the Act for the proposition to be found in paragraph 16 of the case stated by Mr. Justice Pim, to the effect that it was his duty to award such sum to the tenant as should fairly represent the value of the tenant's present interest in the property produced by her or her predecessors which was being transferred to the landlord. It was plainly in deference to this proposition that he was led into the cardinal error of crediting the tenant in this case with the initial sum of £1800, which is his estimate of what he describes as the value of the tenant's present interest in the buildings. To speak of these buildings as the property of the tenant, transferred on the expiration of the lease to the landlord, is entirely misleading as a basis of compensation. Upon the expiration of the lease the entire holding, with everything upon it, improvements and all, reverted to the landlord, subject only to the obligation of the landlord to compensate the tenant in respect of the increased letting value, if any, fairly attributable to such improvements. Further, I am at a loss to see how the fact that the tenant had pursuant to his covenant in the lease maintained these buildings in good condition and repair could influence in his favour the measure of compensation. It certainly saves him from any deduction or set-off by the landlord for breach of his covenant, but its effect ends there. Upon the other question I think it is equally clear that we cannot affirm as a legal proposition that Mr. Justice Pim was not entitled by a rough and ready calculation to estimate the period of the tenant's enjoyment of the improvements at one-third of the capital value of the increased letting value resulting therefrom, had he deducted

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the one-third from the £1200 instead of from the £1800, or that he was compelled to find, as a matter of law, that his measure in money of the value of the enjoyment was a full equivalent for the £1200. No such definite or compelling principle is to be found in the provisions of the Act, and we are therefore unable, confined as we are to questions of law and not of fact, to affirm that the outlay in 1878 so far as it added to the letting value of the holding was of necessity fully compensated for by an annual return of £60 for thirty-seven years. It is quite possible to conceive of cases in which upon the specific facts the duration and extent of the enjoyment would necessarily compensate for the improvement, but this cannot be affirmed as an abstract proposition in a case like the present, even though the capital value of the improvement has paid the tenant interest at 5 per cent. for thirty-seven years, seeing that at the end of this period this capital is gone; whereas, if it had been invested in some trust security instead of being expended upon the security of a terminable lease, the tenant would not only have received interest, but also retained her capital. It is right, however, to point out that as one-third of £1200 after a reduction of £200 would be roughly £335, Mr. Justice Pim may well consider that such an estimate of the value of the tenant's enjoyment which he has himself measured as equivalent to the receipt of £60 for thirty-seven years, or, in other words, at £2200, calls for revision; but this is for him, and not for us. We shall therefore affirm the decision of the King's Bench Division, but without costs to either side, as each party has failed in his appeal.

RONAN L.J.:—

I agree with the judgment of the Lord Chancellor, and the observations I am about to make are merely supplemental to it. We have in this case to deal with the Common Law as varied by the Town Tenants Act. The Irish Land Act of 1870 only applies where it is expressly provided that it shall do so. The Common Law in the case of an ordinary lease, such as this, is clear. A, owner in fee of lands, lets them to B for ten, fifty, or a hundred years at a rent, B having liberty to build on the land if he thinks fit. The lease contains covenants by B to keep all buildings in

repair, and so to deliver them up to A on the expiration or sooner determination of the lease. At Common Law this was a valid and binding contract. Once a building was erected it became part of the land. A had the same title in reversion to it as he had to the land itself, and on the expiration of the lease he was entitled to the possession of it with the land. The covenant in the lease of 1835 in the present case is to "keep in repair . . . all houses, buildings, etc., whatsoever made or to be made," and at the end of the term to deliver them up in good order and repair and condition. The Legislature came to the conclusion that in some cases, at all events, the Common Law might operate harshly in the case of the tenant, and decided to provide a remedy. It is essential to see how this was done: what the Act did, and what it did not do. It gave the tenant a right to claim compensation in money from the landlord (sect. 1). It then gave the right to retain possession of his holding until the amount of compensation was paid or secured (sect. 21 of the Landlord and Tenant Act (Ireland), 1870, applied by sect. 12 of the Town Tenants Act). So far as this case is concerned, it gave him nothing more. It added these rights to his rights under the lease. It modified the covenant to deliver up possession to this extent, but it did not otherwise interfere with the rights of the parties at Common Law under the lease. It did not transfer any property in the land or the improvements to the tenant. As Deasy L.J., dealing with the Act of 1870, says, at p. 173 of *Adams* v. *Dunseath* (1): "The right to claim compensation for improvements, and the obligation to pay, assume and proceed on the assumption that the improvements to be compensated for have become the property of the landlord, subject to the right of the tenant to compensation for them at the end of the tenancy." The expression "have become" can only mean remain as they were at Common Law part of the inheritance, and, therefore, pass to the landlord with it at the determination of the lease. The compensation is not made a charge on the land, except in favour of a landlord who is a limited owner under sect. 27 of the Act of 1870. Even the ambiguous expression in sect. 4, sub-s. 4, of the Act of 1870 "to dispose of his interest in his improvements" is carefully omitted in the

(1) 10 L. R. Ir. 109.

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corresponding sect. 2, sub-s. 1, of the Town Tenants Act; and the words, "to dispose of his interest therein" (i.e., in the new continued, or renewed tenancy) are substituted. I am therefore, of opinion that the fundamental principle on which Pim J. based his award cannot be sustained, as 1, no interest of the tenant "in the property produced by her or her predecessors" was being transferred to the landlord, and therefore it was not his duty "to award such sum to the tenant as should fairly represent the value of" such interest; and 2, as there was no such transfer, he was not right in arriving at such a sum for compensation as would render equitable the transfer of the improvements from the tenant to the landlord. There was no more a transfer of the improvements than a transfer of the land itself.

Sect. 1, sub-s. 1, of the Town Tenants Act gives the right to claim compensation. Sect. 1, sub-s. 2, provides: "Unless the parties agree to refer it to arbitration," the dispute "shall be determined by the Court in accordance with the provisions of this Act . . . and the Court may, in reduction of the tenant's claim, take into consideration" (*a*) the time of enjoyment by the tenant, (*b*) the rent, (*c*) benefits received in consideration of the improvements." Sect. 18 of the Act of 1870, applied by sect. 12 of the Town Tenants Act, provides that the Court "shall admit, reduce, or disallow altogether any such claim, objection, or set-off made or pleaded on behalf of either party as the Court thinks just, giving judgment on the case with regard to all its circumstances." The admirable paragraph (*d*) of the answer of the King's Bench Division (1), and the case stated by Pim J., proceed on the basis that the scheme of the Act is that the tenant is to claim a certain sum on the assumption that there were no reductions, deductions, or claims of set-off to be made, that the Judge should determine, in the first instance, the amount of what I may call this gross claim, and then proceed to adjudicate on the reductions, deductions, and claims of set-off, etc. It is clear from the Act that "the sum to be awarded as compensation for any improvement shall in no case exceed the capitalized value of such addition to the letting value." It is equally clear that this sum is a

(1) [1919] 2 I.R. 206.

maximum, not the necessary nor even the prima facie amount of the compensation apart from deductions. I refer specially to this, as there is a passage in the judgment of Kenny J. (p. 209) which I think is open to misconstruction. He mentions "the increased letting value" as the initial figure in the calculation. I do not think he intended to say anything inconsistent with (*d*) (p. 206), which states the first thing to be determined, and therefore the initial figure, thus: "The amount to be allowed for the additional letting value, resulting solely from improvements, not exceeding the capitalized value as a maximum, should be determined, and that sum should be reduced," etc.

These are the terms of the Order of the King's Bench Division of the 27th January, 1919, from which this appeal was brought. Pim J. took as the initial figure, i.e., the amount of the tenant's gross claim, £1800, though he had found that the capitalized value was £1200 (Case, par. 8). In par. 17 he says the method which he adopted was ". . . first, to view the matter as a transfer of so much rent-producing property from the tenant to the landlord; then to find what the fair value or price of that property was; then" to make the deductions.

I have already pointed out why I think this principle of the transfer of property is erroneous, but I understood that to be a transfer of the increased capitalized value. Par. 18 says: "I found that at a moderate estimate the present value of the buildings is £1800." I deducted from this, "etc." Then follow the deductions. This means that he determines the amount the tenant is entitled to, apart from deductions, to be 150 per cent. of the capitalized value—£1200 + £600 = £1800. He then, by deductions, reduces this to £949, "which is much less than the capitalized value" (par. 18, final clause). Is this process allowed by the Act? This is a very important question. Under sect. 6 the landlord is entitled as of right to deduct rent due. Let us assume that the rent here is £200 per annum, and take two cases. A, the tenant, owes no rent; the maximum he can get is £1200 on his claim. B, the tenant, owes six years' rent (£1200). Does the fact that he owes this rent double the amount he can claim, and entitle the Court to fix his claim at £2400, deduct the rent (£1200), and give a decree for the balance, £1200, which

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does not exceed the maximum? This appears to me a reductio ad absurdum. Such a decree is not a decree for £1200 compensation. It is a decree that the landlord shall pay £1200 compensation, and release the tenant from a debt of £1200. It is, in my opinion, ultra vires.

Sect. 18 of the Act of 1870 requires the Court "to admit, reduce, or disallow altogether any such claim, objection, or set-off made or pleaded on behalf of either party." Sect 1, sub-s. 1, of the Town Tenants Act says "that the sum to be awarded as compensation for any improvement shall in no case exceed the capitalized value." The meaning and object of this is clear, i.e., that as the capitalized value is the utmost benefit the landlord can get from the improvement, he is not to be charged with more. The section does not mean this: "The sum to be awarded for compensation, after giving credit for all cross claims established by the landlord, shall not exceed capitalized value." Such a construction would, in substance, increase the maximum directly by the amount of the tenant's debts and liabilities to the landlord. Such a construction seems to me absurd. The course taken by Pim J. would equally apply if the total deduction from the £1800 had been for rent due only. In my opinion this method of procedure is not allowed by the Act. The "present value" in this case is one and a half times the capitalized value. What does it mean? How is it arrived at? The landlord only gets an increased annual value of £60, which the case capitalizes at £1200 (par. 8). That is apparently what is transferred to him (par. 8). Why should he be debited with £1800 even on the transfer theory? But where does the Judge find the "present value" as distinguished from the capitalized value? Where does the £600 difference come from? Par. 7 of the case states: "The actual value of the works then executed is set out in the schedule to the tenant's application. I am satisfied on the evidence that the figures are accurate, that those relating to expenditure in 1878 and 1879 are based on the cost of building materials at that date, and that the present cost of same would be twice or three times as much." Now, the figures set out are: 1, original cost, £1978; 2, present capital value, £1798; 3, increased letting value, attributable to this and other improvements, £95 per

annum. The cost of the other items is given at £167. It is obvious that the £1800 is simply this £1798 in round numbers: that is, the cost of production. The cost of production of an article and its value when produced are wholly different matters. Many a thing which has cost a great deal to make is found to be of little or no value when made. The annual value of a house is the rent that can be obtained for it. The capital value, the price at which it will sell, generally is estimated at so many years' purchase of the annual value. If house A will sell for £2000, and house B will only sell for £1000, the value of A is double the value of B, although B may have cost £2000 to build, and A have only cost £1000. I make this statement because I am unable to understand what meaning "value in money" can have except the price that can be got. £1800 is twenty years' purchase of £90 per annum.

Does "present value" mean that the house would let for £90 per annum, and that the capital value is twenty years' purchase of this £1800? If so, does it not increase the annual and capital values of the holding by these sums? The whole decree is based on the principle that if there were no reductions or deductions this £1800 would be the measure of the tenant's compensation but for this maximum. But if so, what do the annual and capital values of £60 and £1200 represent? The £60 "is attributable practically in its entirety to the building" (Case, par. 8). The £1200 is the £60 capitalized. Where do the additional £30 and £600 come from? To what are they attributable? What are they? At p. 199 of the Report Gibson J. uses the expression "present capital value." He says:—"A building cost £2000, and when the claim was made was of the capital value of £1000, considered as a structure of bricks and mortar, but from the depreciation in house property in the neighbourhood the added building would not add at all to letting value. Suppose, however, that the new buildings, say, stables in Henrietta Street, or a billiard-room, cost £1000, and were of the capital value of £1000 when the claim was brought, but only added to the letting value £30 a year or less, the compensation would be on the latter figure, for nothing is an improvement save so far as it adds to letting value at date of claim."

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As to the first illustration, I confess I find great difficulty in seeing how a house can have any "capital value" when it has no annual value, except what can be made by knocking it down and selling the materials. I cannot understand capital value "considered as a structure of bricks and mortar" in any other sense than the scrap value. As to the second illustration, I fail to see how a house the annual value of which is £30 can have any capital value beyond the proper number of years' purchase of that annual value. But substituting £1800 for £1000 and £60 for £30, the second illustration becomes the present case. I quite agree with the statement of Gibson J. as to the result, if he only means that the maximum should be based on the £30 a year. That this is plainly what he meant appears from the rest of his judgment.

£1000 is just over thirty-three years' purchase of the £30 per annum, just as £1800 is thirty years' purchase of the £60 per annum. The case fixes twenty years as the number of years' purchase for capitalization. £1800 is twenty years' purchase of £90 per annum. The figure in the claim is £95.

Once it is ascertained, as in the first case, that there is no increased letting value, and, as in the second, that the increased letting value is £30, I do not see what "capital value" or "present" value can mean for the purposes of this Act except "the capitalized value of such addition to the letting value." I quite agree that for the purpose of deciding how much of this capitalized value shall be allowed to the tenant in respect of his claim, the cost incurred by him may be very material; but I fail to see how the cost of the alleged improvements or the present capital value can assist the determination of the increased letting value. The Act plainly shows that the increased letting value must be determined first, and the capital value derived from it.

To put it shortly, I cannot see there is any "actual value," "present value," "capital value," or "present capital value" for the purposes of the Act, except the "capitalized annual value" mentioned in sect. 1, sub-s. 1, and that has been fixed in this case at £1,200.

I cannot see how the cost of building a house in 1878 can be the measure of its "present value," or its "capital value," or its "present capital value," or its "actual value" in 1918, even

though it would have cost "twice or three times as much in 1918" (Case, par. 7).

Mr. Brown did not attempt to sustain the initial figure of £1800 on any of the grounds of value. He put forward a wholly different ground, based on the following passage of the judgment of Sir E. Sullivan in *Adams* v. *Dunseath* (1):—"My opinion is that the word 'improvements,' as used in the 9th sub-clause of the 8th section of the Act of 1881, must receive the same or rather the identical meaning it has in the Act of 1870; and in the various other parts of that Act and the Act of 1881, where the word occurs, it does not and cannot mean the increased letting value of the holding caused by the making of the improvements, but simply the works which have caused that increase, or rather the interest of the tenant who made them, measured by the money expended on them, as declared and limited by the said two Acts. We are not left to speculate on this matter, for the very word is the subject of express definition in the Act of 1870, the 70th section thereof defining improvements as follows:—'Any work which being executed adds to the letting value of the holding on which it is executed and is suitable to such holding.'" Mr. Brown stopped short at the end of the first sentence in the passage, and did not read the second, which shows that the Master of the Rolls was simply stating the effect of the definition quoted. Mr. Brown said, "This shows that the cost of the building is the measure of the tenant's claim. The only limitation on this in the Town Tenants Act is that the ultimate decree after all deductions shall not exceed the capitalized value." This, I think, must be the explanation of the £1800 as the amount of the tenants' gross claim in the case stated; but if the measure of the compensation is the cost of production, why it should be called the present value or the actual value I do not know.

The Court, in *Adams* v. *Dunseath* (1), were dealing with sect. 8, sub-s. 9, of the Act of 1881. A main question discussed by all the Judges was whether under the Act of 1870 a tenant was entitled to the entire increased letting value as compensation for an improvement. The tenant claimed that he was; the landlord disputed this. The Court decided that he was not. Although there is

(1) 10 L. R. Ir. 109, at pp. 136, 137.

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nothing in the Act of 1870 limiting the compensation to the capitalized increased letting value, I cannot find in the case from beginning to end even a suggestion that the tenant could claim more than this. The definition which the Master of the Rolls was expounding does not refer either to the measure of compensation or to the tenant's expenditure. What he was considering is shown by the illustration on pp. 137, 138: "For instance, a tenant paying a rent of £100 a year for his holding during his tenancy may spend £500 in executing works in the nature of permanent improvements, causing an increase of the letting value of his holding of £100 a year at the time he quits. The utmost he could get on quitting his holding under the Act of 1870, even as amended by the Act of 1881, would be £500, and that sum may be capable of being reduced to a lower point." The capitalized value in that case at twenty years' purchase would be £2000. There is not a suggestion in that case, or, as far as I know, in any other case, that where the tenant's expenditure exceeds the capitalized increased letting value, the tenant can claim anything more than the latter. I feel quite certain that the Master of the Rolls never thought of suggesting that he could.

There is really no specific measure of compensation for improvements in the Act of 1870 or in the Town Tenants Act. On the other hand, the English Agricultural Holdings Act, 1900, sect. 1, provides that the tenant shall be entitled as compensation for improvements to "such sum as fairly represents the value of the improvement to an incoming tenant"; and the proviso is added that "there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil." The section is repealed, but re-enacted in Acts of 1906 and 1908; but the proviso is omitted. These provisions show that when the Legislature intends to specify a measure of the tenant's claim it does so plainly. There is not one word that I can find either in the Act of 1870 or in the Town Tenants Act suggesting that the tenant's expenditure is to be the measure of his claim. On the contrary, I think the Act of 1870, and the judgments in *Adams* v. *Dunseath* (1), followed by the Town Tenants Act, clearly show the contrary.

(1) 10 L. R. Ir. 109.

On the other hand, I think the tenant's expenditure may well be regarded when considering how much of the capitalized annual value should be awarded as compensation, and taken as the initial figure or gross claim allowed in the calculation. As to the deductions in respect of legal claims of the landlord under sect. 6, I think the Court should treat them as if they were claimed in an action. As to the deductions for enjoyment, the Court would seem to have full discretion. As to the tenant's claim for compensation, the Court must act on the incorporated section of the Act of 1870.

I can conceive circumstances in which the maximum might be allowed. For instance, if a tenant spent money on improvements and the term shortly after unexpectedly determined, or if, owing to a fall in prices, he was unable (notwithstanding the increased letting value) to pay the rent, and was evicted. In all cases, however, I think the judgment of the Master of the Rolls in *Adams* v. *Dunseath* (1) points to the conclusion that he ought not to be allowed more than his expenditure, including, of course, the value of his own labour.

What I may call the financial aspect of the case was much relied on in the arguments. A landlord L. has a piece of land worth £100 as it stands. Its value can be increased by an expenditure of £1000. A tenant T. proposes to take a lease for thirty-five years. L. thinks the £1000 will increase the annual value by £30 per annum. T. thinks it will increase it by £100 per annum. They agree on a rent of, say, £100. The landlord had the option of spending the £1000. He transfers this to the tenant, but on the terms that if the tenant makes the improvement he can have the benefit of it for thirty-five years, but that the landlord is to get the land with the improvement at the end. The tenant expends the £1000. His estimate is correct. Result: he gets for thirty-five years land worth £200 per annum at a rent of £100 per annum. Assuming that 5 per cent. could be had on safe investment, he gets 10 per cent. on £1000 for thirty-five years. If the landlord had kept the land, he could have done this. Case 2. The tenant spends the £1000. The landlord's estimate is right. Result: the tenant

(1) 10 L. R. Ir. 109.

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gets 3 per cent. on his £1000 for thirty-five years, and then loses the principal. If he had not made the improvement, he could have got 5 per cent., and have the principal at the end of the term. In Case 1 the tenant's estimate was correct, and he gets the benefit. The landlord's was incorrect, and he must bear the loss. In Case 2 the landlord's estimate was correct, and he gets the benefit of the improvement in the increased £30 per annum at the end of the term. The tenant's was incorrect; he must bear the loss. This was the Common Law. The lease was the voluntary act of the landlord; the expenditure the voluntary act of the tenant—it was a speculation on his part. The Common Law was clear. Each party had to stick to his bargain. Qui sentit commodum debet sentire et onus. The Legislature has left the Common Law unaltered as to Case 1, where the tenant has the "commodum" and the landlord the "onus." But in Case 2 it has provided the alternative which I have so fully described.

Moore J. has made some weighty observations on this retrospective legislation as applied in the present case. I entirely agree with these observations. In my opinion, this is essentially a case to which "the old principle applies: that where a modern statute innovates and encroaches on the Common Law such a construction of the enactment should be adopted as would confine this innovation within as narrow limits as are consistent with the giving effect to the recent Act" (1). It is really a jurisdiction to modify an existing contract in favour of one of the parties only.

It is for the Court to decide, in all the circumstances of the case, whether it "thinks it just" to modify the contract to any, and, if so, to what extent, for this is the result of admitting the claim.

O'CONNOR L.J.:—

I agree. The main contention of the landlord upon this appeal was this: that, as a matter of law, Pim J. was bound to refuse compensation to the tenant. That contention would seem to me to require very strong arguments to carry it, having regard to the circumstance that, subject to a certain maximum and to the necessity of considering the element of time of

(1) Per May C.J., 10 L. R. Ir. 133.

enjoyment, the question whether any and if so what compensation should be awarded is a question of fact entirely for the determination of the Judge who tries the case. The landlord's counsel, appreciating this difficulty, say this: "The assessment of this compensation is a matter of arithmetic. Pim J. has found facts and figures which necessarily show that the tenant's expenditure has been more than wiped out by his added enjoyment." Now, treating the matter as one of arithmetic—as to the principle of which I shall say a word in a moment—what are the facts and figures relied on? The tenant, forty years ago, spent a sum of over £1800, which resulted in an increase of the annual letting value to the extent of £60 a year, which capitalized comes to £1200. Therefore, says the landlord, the tenant has had an added enjoyment equivalent to £60 per annum for forty years; £60 per annum for forty years comes to £2400; if £60 per annum were invested year by year in an endowment policy payable at the end of forty years it would realize £4500; whether £2400 or £4500 is taken, the figures wipe out the £1200, which is the amount of the tenant's effective improvements. That amounts to an argument that comes to this: by paying a man who has spent £1200 a yearly sum of £60 (which some people might think not more than reasonable interest) you extinguish the capital. That proposition would be laughed at by a business man; it does not commend itself to me; and as it is the basis of the landlord's argument, that argument falls with it. But in truth the question we are discussing is not a matter of arithmetic at all. The section provides that the Court "may take into consideration the time during which the tenant may have enjoyed the advantage of the improvements." In doing this the Judge should have regard to all the circumstances of the case, and I entirely adopt what Gibson J. says on the point: "A judicial duty to 'consider' is imposed, but amount of reduction is left to the discretion of the Court, trusted to do what is equitable and fair in conditions defying accurate arithmetical computation. The reduction is not 'compensation,' though in certain circumstances the claim might be disallowed altogether. The Court is not required retrospectively to value the enhanced letting value resulting from the improvements when made, and then to treat the tenant's claim as completely or partially

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satisfied by having had the benefit of such enhancement. The discretion of the Court must be influenced by many varying circumstances."

I agree with the conclusion of the King's Bench Division that the £1800 was a wrong figure to have started with, and that therefore the case should be remitted to Pim J. Mr. Brown argued strenuously that when the statute (sect. 1, sub-s. 1) speaks of "compensation in respect of all improvements" it means "compensation in respect of the cost to the tenant of all improvements." I do not agree. I think compensation means compensation for the value of the improvements. I would come to this conclusion, even apart from the proviso, but this proviso, which fixes as a maximum the capitalized value of the addition to the letting value, seems to me to leave the matter clear beyond all doubt.

The question of principle being settled, I decline either to criticize or to praise this statute, or directly or indirectly to suggest what sum should be awarded. The assessment is entirely for the learned Judge, who will use the considerations that seem to him best to arrive at a just conclusion, having regard to the order of the King's Bench Division as affirmed by this Court.

Solicitors for the landlords: *Montgomery & Chaytor.*
Solicitors for the tenant: *Terence O'Reilly & Sons.*

R. ST. J. C.

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June 13, 20.

IN THE GOODS OF IRVINE.

Will—Dependent relative revocation—Printed form containing revocation clause executed by testator—Blanks subsequently filled in—Small estate—Practice—Question decided on motion.

M. I. signed a printed form of will containing blanks, the printed matter including a revocation clause, and his signature was duly witnessed by two witnesses. All the blanks in the form were filled in by M. I. subsequently to execution.

On motion on notice by the person named as executor to have the revocative part alone admitted to probate, the Court found the following facts:—1, That the attempted revocation was merely the first act towards accomplishing testator's design to make a new will; 2, that it was dependent or conditional on a new will being made; 3, that no will was made; and *held*, that the doctrine of dependent relative revocation applied, and that probate should be refused without requiring the alleged will to be propounded.

MOTION ON NOTICE.

Michael J. Irvine, the deceased in this matter, executed a will on June 25th, 1913, and a codicil thereto on March 31st, 1914. A grant in common form was sought of a document alleged to be testamentary, bearing date February 5th, 1914; but the attesting witnesses, having been applied to, disclosed the fact that at the time of execution the document consisted only of a printed form of will, with none of the blanks filled in. The testator subsequently filled in the blanks himself, so that on its face the document appeared to be a valid will. In its completed state it ran as follows, the words inserted by the testator subsequent to execution being here printed in italics:—

"This is the last will and testament of me, *Michael J. Irvine*, of *20 Northumberland Avenue, Kingstown*, in the County of *Dublin*, made this *5th Feby., 1918*, day of in the year of our Lord one thousand nine hundred and *eighteen*. I hereby revoke all wills by me at any time heretofore made. I appoint *my son John P. Irvine, in Religion Father Angelus, Carmelite Order, Clarendon St., Dublin*, to be my Execut and I direct that all

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my just debts, funeral and testamentary expenses, shall be paid as soon as possible after my decease. I give and bequeath unto" [here followed certain bequests written in in deceased's handwriting].

"Signed, published, and declared by the said Testat as and for h last will and testament in presence of us, who at h request, in h presence, and in presence of each other, have hereunto subscribed our names as witnesses. } M. J. IRVINE."

"J. N. DEVITT.

"PATRICK WHITE.

It was admitted that the dispositions of the testator's property written in subsequently to execution were not operative; and the applicant, the Rev. J. P. Irvine, now sought to have so much of the document as revoked all former wills admitted to probate.

J. P. Kenny, for the applicant:—

One of the modes of revocation permitted by the Wills Act is by a writing, duly executed as a will is required to be, declaring an intention to revoke. All questions of revocation are in some degree questions of intention: *Brenchley* v. *Lynn* (1). An express clause of revocation is not conclusive, but is subordinate to the intention: *O'Leary* v. *Douglas* (2).

Arthur Clery, for Harold and Ethel Irvine, beneficiaries under a former will:—

The document is not testamentary. The testator never intended, by placing his signature on it, to adopt the clause of revocation. The signature was merely deliberative. Assuming that the document was a will, it comes within the doctrine of dependent relative revocation. The deceased never intended to die intestate, and only contemplated that the clause of revocation should come into force in the event of his perfecting another will, which in the present case he did not succeed in doing. [He cited *Onions* v. *Tyrer* (3); *Dixon* v. *The Solicitor to the Treasury* (4).]

Cur. adv. vult.

(1) 2 Rob., at p. 462.
(2) 1 L. R. Ir. 45.
(3) 1 P. Wms. 343.
(4) [1905] P. 42.

KENNY J.:—

I think I have all the evidence relating to this alleged will that could possibly be offered, and that I can on this motion determine the questions that have arisen without requiring the document to be propounded in solemn form. The case is a small one, the assets being sworn at about £600, and it is not desirable to incur further costs if they can be avoided.

The applicant, the Rev. John P. Irvine, is the executor named in the alleged will, and also residuary legatee. He is a son and one of the next-of-kin of the deceased, and his application now is that so much of this document as revokes all other testamentary documents be alone admitted to proof. The parties who have got notice of this application, and who have appeared by counsel, are named as beneficiaries in former wills, and are also next-of-kin of the deceased.

The case is a peculiar one, the facts relating to the execution of the document which is the subject-matter of the motion being as follows:—Previously to its execution the deceased had duly executed a will dated the 23rd June, 1913, and a codicil dated the 31st March, 1914; and some time in the beginning of the year 1918 he duly executed, in accordance with the terms of the Wills Act, the document in question. At the time of its execution it consisted of a printed form for a proposed will, with a number of blanks, none of which was filled up until subsequently. It was, in fact, a skeleton will, without a word of manuscript on it, save and except the signatures of the deceased and the witnesses—not even the name of the deceased in the opening paragraph. But the language of the printed matter is of a testamentary character, and it is that printed matter which the applicant now applies to have admitted to proof as constituting the will of the deceased. This document was, as I have said, executed in the beginning of 1918, and on the 5th February, 1918, the deceased proceeded to fill up the blanks in the print, and therein to put his dispositions in writing, without any re-execution or republication, so that to all outward appearance the document seems to be a complete will, and it might probably have passed as such in the Probate Registry but for the fact that the name of one of the principal legatees had been interlined, and proof was required that the

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interlineation was made before execution. The attesting witnesses having been applied to, disclosed the fact that there was no writing of any sort on the form when the deceased and they affixed their signatures. The document as an operative instrument is now confined to the following printed matter:—"This is the last will and testament of me . . . of . . . in the county of . . . made this . . . day of . . . in the year of our Lord one thousand nine hundred and . . . I hereby revoke all wills by me at any time heretofore made. I appoint . . . to be my execut . . and I direct that all my just debts, funeral and testamentary expenses, shall be paid as soon as possible after my decease. I give and bequeath unto . . ." The dispositions subsequently made on the 5th February, 1918, and which admittedly are not valid as testamentary dispositions within the 9th section of the Wills Act, would, if regular, have conferred a life estate on his (testator's) daughter, Ethel Irvine, in some house property in Drumcondra, Dublin, with remainder to his son, Michael E. Irvine, then resident in Canada. The testator left also to his daughter a legacy of £50 and all his furniture, and, after some gifts of personal belongings and a legacy of £50 to the applicant, he appointed the latter residuary legatee. It is manifest, apart from any admission by the parties, that these dispositions fail.

The deceased had been a trustee for an Insurance Company, and was in the habit of attending periodically at the office of the latter, and it was at one of such attendances that he executed the document in question. The witnesses to it are the secretary to the company and one of the clerks. Both gentlemen depose that they were in the habit of witnessing documents such as share transfers for the deceased, and their affidavits establish that at the time when they attached their signatures to this alleged will none of the blank spaces in it was filled in. They also say that towards the end of the year 1918 they again witnessed the signature of the deceased to another printed form of will, which was also in blank. What became of that document does not appear, nor is there any evidence of its contents, or of any dealing with it after its execution; but if it were a blank form such as that which was used in the present case, I see no reason for thinking that like considerations would not apply in

judging of its effect as are relevant to the document which is the subject-matter of the application before the Court. With reference to the will of the 23rd June, 1913, and the codicil of the 31st March, 1914, one of which if unrevoked would constitute the last testamentary disposition of the deceased, the principal beneficiaries under them are the said Ethel Irvine and testator's son, Harold Irvine, both of whom have appeared on and oppose this application, which, if successful, would result in causing an intestacy.

The question, therefore, that has to be determined is whether in the circumstances the revocation contained in the paper executed by the deceased was an absolute revocation, or merely what is known in our procedure as a dependent relative revocation. If the act of revocation, whether by another will duly executed or by the destruction of the existing will, be without reference to any other act or event, the revocation may be an absolute one; but if the act be so connected with some other act or event that its efficacy is meant to be dependent on that other act or event, it will fail as a revocation. If that other act be efficacious, the revocation will operate; otherwise it will not. It is altogether a question of intention, and if, as part of the act of making a fresh will, there will be a revocation of a previous will, that revocation will be absolute provided the fresh will be made. On the other hand, if the fresh will be not made, it would defeat the testator's intention to hold the revocation to be absolute. It had no existence, unless subject to a condition which is not fulfilled. The principle will be found stated in Williams on Executors and Theobald on Wills, and is established by such cases as *Onions* v. *Tyrer* (1), *Hyde* v. *Hyde* (2), and *Ex parte The Earl of Ilchester* (3). Cases in which a testator destroys a will with the intention of setting up a previous disposition introduce the same principle. In *Powell* v. *Powell* (4), the testator had destroyed a will with the expressed intention of validating an earlier will and substituting it for the destroyed will. The destruction of the second will did not give effect to that intention, and it was held by Sir J. P. Wilde (afterwards Lord Penzance) that such conditional destruction did not work a

(1) 1 P. Wms. 343.
(2) 1 Eq. C., at p. 409.
(3) 7 Ves., at p. 380.
(4) 1 P. & D. 209.

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revocation, inasmuch as, the sole condition upon which revocation was intended not being fulfilled, the animus revocandi was not present. To the same effect are *Gentry's Case* (1); *Dancer* v. *Crabb* (2); and *Dixon* v. *The Solicitor to the Treasury* (3). In *Gentry's Case* (1), while the principle was admitted, the revocation was, on the facts, held to be absolute and not dependent. In *Dixon's Case* (3) it was held by Gorell-Barnes J. that the doctrine might apply to a case where the document intended to be substituted is non-existent and has never existed as a valid testamentary paper. Almost the last case on the subject is that of *Irvin, deceased* (4). In 1901 the testatrix had made a valid will. In 1907 she signed a paper purporting to be a will, but which was not attested, and was consequently invalid. At the same time she destroyed the will of 1901 in the belief that the unattested paper of 1907 was a valid disposition. *Dixon's Case* (3) was cited, and the Court on motion held the case to be one of dependent relative revocation, and granted probate of the destroyed will of 1901, as contained in a completed and verified draft of it.

In my opinion, there can be no doubt that the principle of dependent relative revocation applies in the case before me. From the evidence I draw the following conclusions of fact:—1, that the attempted revocation was merely the first act towards accomplishing the design of the testator to make a new will; 2, that it was dependent and conditional on a will being actually made; and 3, that no will was made, and consequently that the intention failed in execution.

I must refuse the application.

Solicitors for the applicant: *Sheridan & Kenny.*

Solicitors for Harold Irvine and Ethel Irvine: *Ryan & O'Brien.*

T. C. T.

(1) 3 P. & D. 80.
(2) 3 P. & D. 98.
(3) [1905] P. 42.
(4) 25 T. L. R. 41.

In the GOODS of WOLFE.

K. B. Div. (Probate.) 1919. Nov. 7.

Will—Residuary bequest—"Personal effects"—Words—Gift of "my walking-stick" to B, followed by a gift of "all my personal effects" to C.

A testator left his interest in landed property to A, his walking-stick to B, and all his personal effects to C.

Held, that the last gift captured the residue of testator's personal estate.

Motion ex parte.

Oscar Philip Wolfe, on February 24th, 1916, made his last will in the following words:—"I revoke all wills and testamentary instruments heretofore made by me. I give and bequeath to my nephew, Robert Irwine Garron Wolfe, the whole of my interest in the estates of Cloughranke and Cloughpooke, county Kilkenny, Ireland, of which my father, the late Robert Wolfe, had one-tenth share, and which he bequeathed to my mother, and on her death to be equally divided amongst his children. I also bequeath to the above Robert Irwine Garron Wolfe my walking-stick . . . I also bequeath to my mother all my personal effects."

The testator died on December 1st, 1918, a bachelor, leaving him surviving his mother, Henriette H. D. A. F. Wolfe, and two lawful brothers and two lawful sisters (including the applicant), his sole next-of-kin. The testator's mother died on February 2nd, 1919, having duly made her last will, dated January 30th, 1919, whereof she appointed her daughter, Hilda Violette Wolfe (the present applicant), executrix, and probate of the said will was granted to Hilda Violette Wolfe on June 10th, 1919. Hilda Violette Wolfe, as executrix of her mother, having applied for a grant of administration with will annexed of the personal estate of Oscar Philip Wolfe, claiming to be entitled thereto as personal representative of Oscar Philip Wolfe's residuary legatee, the Assistant-Registrar declined to make the grant without an order of the Court, on the ground that, having regard to the wording of the will, it was not clear that Mrs. Henriette H. D. A. F. Wolfe was the residuary legatee of the said Oscar Philip Wolfe.

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IN THE GOODS OF WOLFE.

Hewitt Poole, for the applicant:—

I submit that the gift to testator's mother of "all my personal effects" is a good gift of the residuary personalty. There is no case exactly on all fours with this.

[KENNY J.:—Had he any other real estate than what is mentioned?] No.

In *In re Seton-Smith* (1), the words used were: "All the furniture and other personal effects belonging to me, and which at the date of my death are at the Roebuck Hotel." I admit that the ejusdem generis rule applied there. But the importance of that case from the applicant's point of view is that counsel argued that trade and tenants' fixtures passed under the will, which argument Buckley J. refused to accept, and went on to say: "The residuary legatees say that the only things that passed to Miss White were those which belonged to the testator in the sense that he used them personally, and not merely for the purposes of the business. That is not the view which I take." Unless the words are so limited here, how can they be limited to anything short of the entire personalty? In *Crichton* v. *Symes* (2), the words used were: "All my goods, wearing apparel, of what nature and kind soever, except my gold watch." It was there argued that the gift was confined to wearing apparel, but Lord Hardwicke decided that the gift captured all testatrix' household goods and furniture, as well as her wearing apparel and personal ornaments, exclusive of her gold watch. Here the testator dealt with landed property (which he believed to be realty), and then proceeded to deal with the personalty.

KENNY J.:—

Mr. Poole's argument is an attractive one. I think the testator did intend to draw a distinction between the realty (or what he believed to be realty) and the personalty. Though not without some hesitation, I will give effect to that argument, and will grant administration to the applicant as personal representative of deceased's residuary legatee.

Solicitors for applicant: *William Findlater & Co.*

T. C. T.

(1) [1902] 1 Ch. 717.

(3) 3 Atk. 61.

THE PROVOST, FELLOWS, AND SCHOLARS OF TRINITY COLLEGE, DUBLIN, APPELLANTS; THE COMMISSIONER OF VALUATION IN IRELAND, RESPONDENT (1).

K. B. Div.
1919.
March 31.
April 1, 2.
July 3.

Rates—Exemption—Building of a public nature or used for public purposes—Trinity College, Dublin—Freedom from external control—15 & 16 Vict. c. 63, ss. 15 and 16—17 & 18 Vict. c. 8, s. 2.

Trinity College, Dublin, provided university education, and was open to all members of the public, subject to the payment of certain fees. The College was free from all external control, as regards its government, teaching, and finance.

Held, that the buildings of the College were not of a public nature or used exclusively for public purposes, and were not exempt from assessment under the Irish Rating and Valuation Code.

CASE STATED for the opinion of the King's Bench Division by the Recorder of Dublin, under the provisions of 23 & 24 Vict. c. 4, sect. 10.

The case came before the Recorder on appeal by the Provost, Fellows, and Scholars of Trinity College, Dublin, against the decision of the Commissioners of Valuation that the buildings of the College were not exempt from assessment as being of a public nature or used exclusively for public purposes.

The following facts appeared from the Case Stated:—

The University of Dublin was founded by Queen Elizabeth in 1591, when the College was incorporated by Charter or Letters Patent under the title of "the College of the Holy and Undivided Trinity, near Dublin, founded by Queen Elizabeth." The benefits of the College were at one time confined to members of the Church of Ireland, but by the Statute 36 Vict. c. 21, all religious disabilities were abolished, and the College and all offices in it were thrown open to persons of all religious denominations.

The government of the College is in the hands of the Board, in conjunction with the Visitors, save that in matters relating to the conferring of Degrees the sanction of the Senate is required. The

(1) Before MOLONY C.J., and GIBSON and KENNY JJ.

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Board consists of the Provost and seven Senior Fellows, and the Fellows, if any, other than Senior Fellows who may be elected by the Board to the office of Bursar, Senior Lecturer, or Registrar, with two representatives of the Junior Fellows and two representatives of the professors. The Senate consists of the Chancellor, or, in his absence, the Vice-Chancellor, and such Doctors or Masters of the University as keep their names on the books of the College. The Council consists of the Provost, or, in his absence, the Vice-Provost, the Senior Registrar, the Registrar, and sixteen elected members of the Senate; the Council nominates to all professorships, except those the nomination to which is vested in some other body or person by Act of Parliament, or by directions of private founders. The Provost is appointed by the Crown. When the office of Chancellor becomes vacant, the Board propose to the Senate the names of three persons from amongst whom the Senate elect a Chancellor. The Vice-Chancellor is appointed by the Chancellor. The Fellows are elected by the Board. The Visitors are the Chancellor and the Lord Chief Justice of Ireland. The students of the College are of five orders, viz.: 1, noblemen, sons of noblemen, and baronets; 2, Fellow Commoners; 3, Scholars; 4, Pensioners, namely, ordinary students in arts; 5, sizars, admitted annually by examination. For Pensioners, the entrance and half-yearly fees are fifteen pounds and eight guineas respectively; for Fellow Commoners, thirty pounds and sixteen guineas respectively; for noblemen, sons of noblemen, and baronets, sixty pounds and thirty-two guineas respectively. Of the half-yearly fees, one half is distributed among the tutors and professors; the other half is paid into the common fund of the College. The sons and brothers of Fellows and ex-Fellows are exempt from tuition fees.

The College has large endowments, derived in part from parliamentary grants. By Royal Letters of 18th Vict. an auditor of the College accounts must be appointed with the consent of the Visitors, and the annual accounts must be transmitted to the Visitors. By decree of the Board and Visitors, a second auditor, not a Fellow, is to be appointed by the Board to re-audit the accounts of the preceding year, and the annual balance sheet is open at stated times fixed by the Provost for the inspection of the Fellows, and of them only.

The College is free from all external control as regards its government, teaching, and finance. The teaching of the Divinity School is that of the Church of Ireland, and the services in the College Chapel are those of that Church. Degrees in divinity are under the control of a prescribed court of divinity professors, subject to the approval of the Board. Special arrangements may be made for divinity students of other religious denominations; all schemes of divinity teachers must be approved of by the Board, and the Regius Professor of Divinity must be an examiner. No such scheme has been sanctioned by the Board.

Jellett K.C. (with him *FitzGibbon K.C.* and *Poole*), for the appellants:—

The purpose for which the College was founded was the education of the youth of Ireland—a public purpose of the widest character. We claim exemption for all buildings necessary for the work of the College, including the rooms occupied by Fellows for the purpose of carrying out their duties. The source from which the income of the College is derived is not the test: *Commissioner of Valuation* v. *Sligo Harbour Commissioners* (1). The purpose of the College is none the less a public purpose because one part of the public gets more benefit than others. Payment for services rendered cannot be considered in the nature of a private profit: *Royal College of Music* v. *Westminster Vestry* (2). Since the enactment of Fawcett's Act (36 Vict. c. 21) the College has been open to all creeds. It cannot be said that it is not open to the public generally because it is not possible for all persons to comply with the requirements of the College by inability either to pay the requisite fees or to pass the necessary entrance examination: *University College, Cork,* v. *Commissioner of Valuation* (3). The benefit extended to the whole nation. The teaching of theology is essential to a complete university. If it were possible to have a school of theology for every creed, none of those schools could be for public purposes, because each of them would be only for a class; all that can be done is to have a divinity school for one creed, and to allow all to attend it and compel none; the

(1) [1899] 2 I. R. 214. (2) [1898] 1 Q. B., at p. 818.
(3) [1912] 2 I. R. 328.

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theological lectures are open to the public, and the degrees in divinity may be taken by persons of any religious belief. It is not the University, but his own conscience, which prevents any person from availing himself of its theological teaching. An anti-vivisectionist might similarly be debarred from attending the lectures on anatomy.

They also referred to *Mersey Docks* v. *Cameron* (1); *Guardians of Londonderry Union* v. *Londonderry Bridge Commissioners* (2); *Belfast Harbour Commissioners* v. *Commissioner of Valuation* (3); *Pembroke Urban District Council* v. *Commissioner of Valuation* (4); *Clancy* v. *Commissioner of Valuation* (5); *St. Botolph Parish Estates* (6); *Re Oxford Poor Rate* (7).

Clancy K.C. (with him *T. Sullivan K.C.* and *P. O'C. White*), for the Corporation of Dublin:—

The College can control its own affairs free from interference by anyone. The endowments which were given to the College by Parliament were in the form of capital sums, which passed absolutely into the possession of the College, and Parliament has no control over the College as regards finance or otherwise. The audit is a purely domestic one. In the case of *University College, Cork*, v. *Commissioner of Valuation* (8), the College enjoyed an annual income from Parliament, and was bound to present to the Auditor-General an annual statement of its accounts, which was laid before Parliament. The College is not used exclusively for public purposes; the sons and brothers of Fellows and ex-Fellows are exempt from tuition fees; the nature of the teaching in the theological school confines its benefits to members of one Church and the theological school is inseparable from the rest of the College.

Carrigan K.C. (with him *M'Elligott K.C.* and *J. M. FitzGerald*), for the Commissioner of Valuation:—

The accounts of Trinity College show that after payment of all expenses there is a profit; therefore the College is not used

(1) 11 H. L. C. 443.
(2) I. R. 1 C. L. 283.
(3) [1897] 2 I. R. 516.
(4) [1904] 2 I. R. 429.
(5) [1911] 2 I. R. 173.
(6) 35 Ch. D. 142.
(7) 8 E. & B. 184.
(8) [1912] 2 I. R. 328.

exclusively for public purposes: *Guardians of Waterford Union* v. *Barton* (1). The College is not used exclusively for the education of the poor, and therefore is not exempted as a charity: *O'Neill* v. *Commissioner of Valuation* (2); and if the College cannot get relief as a charity, it cannot get it by calling itself a public institution. The College is intended for a particular class, not for the public at large, and therefore is not entitled to exemption: *Corporation of Cork* v. *Commissioner of Valuation* (3).

MOLONY C.J.:—

The question for determination by this Court is whether the hereditaments and premises situate in College Green and Lincoln Place, in the city of Dublin, constituting the premises known as Trinity College, Dublin, save and except such portions of the buildings as are used as residences for the students, are of a public nature within the meaning of the provisions of the Valuation Acts, which the Commissioner of Valuation is bound to distinguish as such in the List of Valuations under 17 Vict. c. 8, s. 27.

Trinity College was founded by Charter of Queen Elizabeth in 1591 (34 Elizabeth) under the style and title of "The College of the Holy and Undivided Trinity near Dublin, founded by Queen Elizabeth." The object of the foundation was declared to be "for the education and training and instruction of youths and students that they may be better in the study of the liberal arts and in the cultivation of virtue and religion." The Provost, Fellows, and Scholars were declared to be a corporate body, with power to sue and be sued by their corporate name, and to make laws for the regulation of the College.

Immediately upon its incorporation the College received lands from the Corporation of Dublin, comprising the premises now in question, and they subsequently received from the Crown various grants of land in other parts of Ireland, and in addition were voted by Parliament large sums of money for the erection of buildings.

At first the benefits of the institution were confined to members of the Church of Ireland, but admission to the College has been

(1) [1896] 2 I. R. 538. (2) [1914] 2 I. R. 447.
(3) [1916] 2 I. R. 77.

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open to members of all denominations since 1793, and since 1873 the Provostship, Fellowships, and Foundation Scholarships have also been, under the provisions of the statute 36 Vict. c. 21, thrown open to all religious denominations.

I do not propose to go in detail into the history of the institution, which will be fully dealt with in the judgment of my brother Gibson. In determining the question whether they are entitled to exemption, the state of the institution must be considered as of the time when exemption is claimed.

Poor rate was first imposed in Ireland in 1838, and from that year down to 1917 poor rate was regularly paid by the College, and no exemption claimed. In 1902, however, when an effort was made by the Corporation to put into the poor rate items which had never hitherto been borne by the College, they contested the matter, and lodged the amount of the original poor rate in Court, and succeeded in defeating the claim in this Court, and also in the House of Lords.

The position of the College at present is this. The premises that we are dealing with consist of the college park, library, examination hall, dining hall and kitchen, lecture rooms, medical school, museums, laboratories, regent hall, steward's house, Fellows' rooms, printing house, Provost's house, and gate lodge. It was admitted in the case stated that the students' rooms are not exempt, and Mr. Jellett, in the course of the argument, made a similar concession with regard to the printing house. All the premises here in question are used in connexion with and form part of the buildings known as Trinity College, and must be considered as a whole: *Greig* v. *University of Edinburgh* (1). The College has a large revenue, varying in some details from year to year. The financial statement for the year ending 30th September, 1916, was put in evidence, and it discloses the financial state of the College at that date. It appears from it that the revenue for the year ending 30th September, 1916, amounted to £65,169 13*s.* 6*d.*, and the outlay to £64,179 17*s.* 7*d.*, leaving a balance of income over outlay of £989 15*s.* 11*d.* The net rental of estates amounted to £30,954 2*s.* 6*d.*, and in addition there was received from the

(1) L. R. 1 H.L. Sc. 348, 351.

Public Trustee, under the provisions of sect. 39 of the Irish Land Act, 1903, the sum of £1434 13*s.* The dividends on investments brought in £17,885, and in addition there were grants from the India Office and the King's Inns in respect of students, amounting to £375. The amounts received from students in fees and brought into the account amounted to £11,430 14*s.* 8*d.* The amount paid by graduates in respect of the conferring of the higher degrees amounted to £1641 16*s.* 2*d.*, and there were sundry other sums received amounting to £1448 4*s.* 10*d.*

Out of this income the Provost and Fellows, Professors and Lecturers were paid, and in addition the various buildings were maintained, and the salaries and upkeep of the various professional schools provided for. Provision was also made for the Chapel and domestic expenses, and a moderate sum was devoted to charity. The money which comes into the account and which was paid to Tutor Fellows does not, however, represent the entire sum which they receive, because only half the amount of the fees of students is paid into the common fund, the other half being devoted in accordance with the financial rules made in pursuance of a Decree of the Board and Visitors, dated 11th June, 1859 (vol. ii, College Statutes, p. 199). Under these rules the money accruing under the name of tuition fees, deducting the Junior Bursar's poundage, is divided into two moieties, and one-eighth of one moiety is the property of the tutor whose pupil has paid the fees, and seven-eighths is thrown into a common fund, which is to be distributed amongst tutors and professors entitled to share in it in the proportions therein mentioned. The rules also contain a provision that sons and brothers of Fellows and ex-Fellows shall be exempt from tuition fees. As regards the management of the institution and of its finances, the College is entirely free from Government control. The accounts are audited with the assistance of an outside auditor, but, as was stated by Mr. Cathcart, the Senior Bursar "We are perfectly free from the Government as regards our finance and our mode of dealing with it."

The College is, therefore, an institution endowed with large sums for educational purposes, and free from external control. It offers education in arts to students who are in a position to pay; for Pensioners the entrance and half-

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yearly fees of £15 and £8 8*s.*; for Fellow Commoners, £30 and £16 16*s.* respectively; and for Filii Nobilium, £60 and £33 12*s.* respectively; and, in addition, it gives education and degrees in the Schools of Physic, Law, and Engineering at moderate fees, and in the School of Divinity without any fees at all.

The question is whether an institution with such a revenue and free from external control can claim to be exempt under the Valuation Code.

It is well, in the first instance, to refer to the sections under which exemption is claimed. Sect. 15 of 15 & 16 Vict. c. 63 enacts that "in making out the list or table of valuation the Commissioner shall distinguish all hereditaments and tenements, or portion of the same, of a public nature, or used for charitable purposes, or for purposes of science, literature, and the fine arts, as specified in 6 & 7 Vict. c. 36, and the value of the same shall be deducted from the gross amount of the valuation of the hereditaments and tenements comprised in each such list or table; and all such hereditaments or tenements, or portions of the same so distinguished and deducted, shall, for the purposes of this Act, be deemed exempt from all assessments whatsoever so long as they shall continue to be of a public nature or used for the purposes aforesaid." Sect. 16 of the same Act provides that "for the purposes of such valuation no hereditaments or tenements, or portions of the same, shall be deemed to be of a public nature, or used for such charitable, scientific, or public purposes as hereinbefore specified within the meaning of this Act, unless such hereditaments or tenements, or portions of the same respectively, shall be altogether of a public nature, or used exclusively for such charitable, scientific, or other purposes as aforesaid"; and sect. 2 of 17 Vict. c. 3 repeats the 15th section of the earlier Act down to the words "6 & 7 Vict. c. 36," and then continues:—"And all such hereditaments or tenements, or portions of the same so distinguished, shall, so long as they shall continue to be of a public nature and occupied for the public service, or used for the purposes aforesaid, be deemed exempt from all assessment for the relief of the destitute poor in Ireland and for grand jury and county rates."

In *The Guardians of the Londonderry Union* v. *Londonderry Bridge Commissioners* (1) it was held that a bridge which was found

(1) I. R. 2 C. L. 577.

to be a public highway, open to and used by all Her Majesty's subjects, "was a hereditament dedicated to and used for public purposes." In that case the Bridge Commissioners were empowered by the Londonderry Bridge Act, 1859, when the bridge should be completed, to erect toll houses and take tolls, and the tolls were to be applied in the manner directed by the statute, which precluded the idea of any portion thereof being employed for any private profit.

In *The Mayor of Limerick* v. *The Commissioner of Valuation* (1) it was attempted to bring a gasworks within the principle of the *Londonderry Case* (2); but it was unanimously held by the Court that gasworks were not occupied for a public purpose, and were, therefore, not exempt from being rated. In the same year exemption was claimed on behalf of the premises of the Representative Church Body in Stephen's Green: *Representative Church Body* v. *Commissioner of Valuation* (3); and it was also held that the premises in that case were not of a public nature. As FitzGerald J. said:—"I cannot hold that the occupation of these premises by this financial body is an occupation for public purposes. If we were to decide otherwise, how far would the decision carry us? It is true that the doors of the churches, for the maintenance of which the Representative Body watches, are open to all who may choose to enter; but the same may be said as to the churches of the least numerous sect in the community. That argument in favour of exemption from valuation would apply to every religious sect, however small, that occupied premises for the financial purposes of their respective bodies."

In *The Belfast Harbour Commissioners* v. *The Commissioner of Valuation* (4) the property of the Belfast Harbour Commissioners was held to be "dedicated to or used for public purposes," and within the exemption of the Valuation Acts as interpreted in the *Londonderry Bridge Case* (2); and the same decision was come to in this Court, and affirmed by the Court of Appeal as regards Sligo: *The Commissioner of Valuation* v. *Sligo Harbour Commissioners* (5).

(1) I. R. 6 C. L. 420.
(2) I. R. 2 C. L. 577.
(3) I. R. 6 C. L. 561.
(4) [1897] 2 I. R. 516.
(5) [1899] 2 I. R. 214.

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The first time that exemption was claimed for a college on the ground that it was used for public purposes was in the case of *The Guardians of the Waterford Union* v. *Barton and others* (1). The de la Salle Brothers have a Training College in Waterford for National teachers, which was built at the expense of the community out of their own funds. A certain number of students were admitted, subject to the sanction of the National Board, and supported and educated wholly out of a grant of £50 for each person made by the Government, and sums received from the Government as awards for proficiency. Besides these, certain persons were admitted at the yearly fee of £50 each for the purpose of being prepared to receive the sanction of the Commissioners of National Education, and thereby become entitled to the public endowment; and it was held that, having regard to the admission of the students paying such yearly fees, the College was not used exclusively for charitable or public purposes, and was not altogether of a public nature, and was, therefore, not exempt from rating. In *The Pembroke Urban District Council* v. *The Commissioner of Valuation* (2) it was sought to apply the principle of the *Waterford Case* (1) to the Pembroke Technical Schools, in which a non-compulsory fee of 2*s.* 6*d.* per head was charged to the pupils, and expended in providing light and fuel to the school, and in cleaning the school windows. The distinction between the two cases is thus drawn by Lord O'Brien C.J.: "It is said that because a fee of 2*s.* 6*d.* is sometimes charged for admission this deprives the institution of its public character, and renders the institution one of not altogether a public nature, and the case of *The Guardians of the Waterford Union* v. *Barton and others* (1) was cited. This case is clearly distinguishable. The charge of 2*s.* 6*d.* for admission, as appears from a memorandum to which, by consent of both parties, we were referred, was made to secure the attendance of bona fide and serious students, and for the purpose of excluding those who would only delay and embarrass progress by curiosity or idleness, and thwart the purposes of the institution; it was, in fact, imposed to make the administration of the public trust for educational purposes more effective. The money realized, small in itself, was applied and must be applied to the source

(1) [1896] 2 I. R. 538. (2) [1904] 2 I. R. 429.

from which it came. It was produced by the public trust, and must go back to and be applied for the benefit of the trust. The fact that there is in the present case, as I am of opinion there is, a clear obligatory trust to apply the fees in question for the benefit of the institution distinguishes the case from that of *The Waterford Union* v. *Barton*" (1).

In 1911 it was held by this Court and the Court of Appeal that the hereditaments and buildings comprising the University College in Cork were altogether of a public nature and used for public purposes, and this was strongly relied upon by Mr. Jellett in the course of his argument. When, however, it is closely examined, it will be seen to be clearly distinguishable from the case of Trinity College. The College was open to all His Majesty's subjects, and although fees were charged to students they were not payable to the professors, but were brought into the general funds of the College, and the College was bound to present annual accounts of all receipts and expenditure to the Controller and Auditor-General, and these accounts, together with the report of the Controller and Auditor-General, had to be laid before Parliament. It was proved that the buildings had been purchased or acquired for the purposes of the Queen's College with moneys provided by the Treasury out of the Consolidated Fund, and that the premises were maintained for the time being by the Commissioners of Public Works out of moneys annually provided by Parliament for the purpose. Under the Irish University Act, 1908, the Queen's College, Cork, became a constituent College of the new university having its seat in Dublin, and the buildings became vested in the new college. It was therefore clear that University College had been built and maintained out of moneys provided by Parliament, and that Parliament retained control over it, and that no professor shared in the fees.

The case of Trinity College is essentially different. It is an independent institution, not subject to Government or any other control. No person has a legal right to become a student, and no person can become a student without paying the usual fees, except he wins a sizarship, in which case he only pays a small entrance fee. The fees when paid do not go exclusively for the benefit of the

(1) [1896] 2 I. R. 538.

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institution, but portions of them go to the Tutor Fellows, and are distributed pursuant to the rules of 1859, and each Fellow has a right under the same rules to have his son and brother exempted from payment of tuition fees. If Trinity College is to be exempt from the payment of poor rate, it is difficult to see why exemption is not to be claimed by every other college in the country. In my opinion the case of the University College, Cork, is clearly distinguishable from that of Trinity College, and I cannot see any valid reason why Trinity College should obtain exemption.

Gibson J.:—

The questions for decision are whether Dublin University is, in its present constitution and working activity, altogether of a public nature, and whether, if it is not, certain of its buildings and premises may not be of such character. It is strange that the universities of Great Britain, old and new, however founded, should be rateable, and Irish universities free; and still stranger if Trinity, so long the sole National University, should be subject to charges from which the newly created University College in Cork is exempt. In the rest of the United Kingdom immunity, save where special legislation otherwise expressly provides, only attaches in case of property occupied for purposes of State, or where the property, such as a public park, is not the subject of real occupation, or the occupation, such as it is, appears to be of no value: *Lambeth Overseers* v. *London County Council* (1); *Mayor of Liverpool* v. *West Derby Union* (2). A still more remarkable difference between the Irish and English rating systems is that in ours there is no appeal in valuation to the House of Lords. Liability or immunity cannot be tested in an action for rates, the valuation being conclusive.

The first matter for consideration is our rating legislation in its historical development, reviewed in *O'Neill's Case* (3). It may be considered in stages: before the statutes of William IV, the subsequent period before 1852, and the period since. In each we must ask ourselves: Was Trinity College at that time rate-free, and if it was not free in 1854, did it become so afterwards, and when?

(1) [1897] A. C. 625. (2) [1908] 2 K. B. 647. (3) [1914] 2 I. R. 447.

The charges leviable in Dublin towards the end of the eighteenth century, as appears from the table prefixed to Mr. Cullinan's volume, were of various types—paving, lighting, and watching (e.g. 26 Geo. 3, c. 61, s. 52), malicious injuries, hospitals, &c. There was no general provision for the poor, but there were houses of industry; poor children were sent to the Foundling or Charter Schools, the latter proselytising establishments, which, as charitable public institutions, were favoured by the Irish Parliament. By 11 & 12 Geo. 3, c. 30, s. 9, presentment for the poor was authorized to be made off lands and houses equally and rateably. 13 & 14 Geo. 3, c. 19 (for the better and more certain valuation of houses in cities and towns) created exemptions from valuation and rating in favour of certain specified houses; but Trinity College (a large portion of whose Dublin estate was not then built on, as appears from 39 Geo. 3, c. 53) was not within any of the enumerated classes. This enactment was before the Courts in many cases, from *Roe* v. *Darley* (1) to *Farquharson* v. *Richards* (2), decided in 1854, all noted in Brunker's Digest. The decisions were based on Crown immunity from cess; Crown property did not require special provision.

In this early legislation I find nothing to relieve the College from assessments for the poor or general city charges. If, in fact, such exoneration was allowed, it ought to appear in the College accounts, of which, if preserved, we have no evidence. In some statutes imposing new taxation, special exemption was conceded to the College; but this would rather support the inference that otherwise it would have been liable. The Irish Parliament, as Mr. Cullinan's Index shows, made liberal grants to Trinity College, the Dublin Society, &c., as it did also for agriculture, trade, charter schools, &c.; but from its exhibition of fostering care in individual instances an intention cannot be deduced to withdraw College property from rating, and thereby to increase the assessment on the general body of ratepayers. The exemption from taxes in the Charter or Caroline letters never was, or could be, applied to rates on property not in Crown occupation. Unless the Valuation Acts give immunity, the charter and letters give no protection. The king cannot exonerate a

(1) 1 H. & B. 442. (2) 4 I. C. L. 150.

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subject from the consequences of future legislation in respect of hereditaments occupied by the subject, whether derived from the Crown or private donors.

The legislation preceding our present valuation code, 1852–1854, is fully discussed by the Chief Baron and me in *O'Neill's Case* (1). The Acts of 1832, c. 73, and 1836, c. 84, resemble our statutes of 1852 in structure, language, and order of words. The Poor Law Act, 1838, in sect. 34, deals with the existing provision for the poor, and in sect. 63 specifies the exemptions to be allowed, putting "public purposes" as the last, and not the first, class, and omitting the word "altogether." 6 & 7 Vict. c. 32 (which is confined, like 13 & 14 Geo. 3, c. 19, to cities and towns) follows the drafting of the Poor Law Act, sect. 63.

The last phase in our legislation is the present valuation code. The Act of 1852 is expressed to be designed to create a uniform valuation for the purpose of all public and local assessments and other rating, and would seem to replace the Poor Law Act and the statute, 6 & 7 Vict. c. 32. Section 16 repeats the word "altogether," found in the statutes of Wm. 4; and sects. 26 and 27 comprise all county assessments, and poor and town rates. The expression "public nature" has the same effect as "public purposes"; exemption depends on the actual use of the hereditaments: *Eckersall* v. *Briggs* (2). Crown property while occupied by a subject is rateable. The word "altogether" is equivalent to "exclusively"; it is so interpreted in sect. 12.

The Act of 1854, c. 8, sect. 2, confines exemption to poor rate and grand jury and county rates. The effect of this in town rating was considered in the two Exchequer cases noted in 2 Vanston, p. 743. What might seem a new condition (not expressed in the statutes of Wm. 4 or the Poor Law Act) is now introduced; hereditaments are only to be exempt while they continue to be of a public nature and occupied for the public service. The copula "and" and the definite article might suggest that "the public service" was of the same type as that mentioned in statutes such as 22 Geo. 3, c. 45, sect. 1. Our Irish decisions exclude such construction, and deny any independent or substantive effect to the added language. Still it may be that the phraseology was

(1) [1914] 2 I. R. 447.

(2) 4 T. R., at pp. 9, 10.

influenced by the growing disinclination to extend rating exemption at the expense of ratepayers generally, shown by such cases as *Badcock's Case* (1), the *Harrogate Case* (2), the *Birkenhead Case* (3), and *Temple's Case* (4). These two last important cases, decided by Lord Campbell just before our Act of 1852, were not brought before the Court in the *Derry Bridge Case* (5). In the *Harrogate Case* (6) Lord Campbell is emphatic that all the purposes must be public. Where the yield of the hereditament is entire, and part is applied to purposes not public, protection is lost. Part, however, of the hereditament may be in private rateable occupation, as in *Catt's Case* (7), and similar instances referred to in Ryde on Rating; and the occupation of a mere custodian may not be rateable. The association of county cess with poor rate is noticeable. Would a farm or fishery belonging to the College (as in *O'Malley* v. *Congested Districts Board* (8)), while unlet in the occupation of the College, be free from cess and poor rate as occupied for the public service?

I now pass to Trinity College as it stands to-day at the date of the valuation, serving the nation as it does, liberated from restrictions which fettered its usefulness, and extending its advantages as a national educational centre in every direction. Counsel confined their attention to the two volumes of Statutes (so called) and two volumes of College Calendars, vol. i, 1917–18; vol. iii, 1912–1913. These materials, containing much that is obsolete though not expressly repealed, form the basis of the following brief survey and estimate of the institution in its present state. They comprise the original charter, statutes, letters patent, royal letters not patent, decrees with consent of visitors and decrees simply. They do not enable an accurate conclusion to be formed as to the internal and financial administration of the University. I have looked into the various College Histories by Taylor, Stubbs, the late Provost (Dr. Mahaffy), and Dixon, some old calendars (of which that of 1833 is perhaps the most important), the contributions of Dr. Stubbs and the Provost to the

(1) [1845] 6 Q. B. 787.
(2) [1850] 15 Q. B. 1012.
(3) [1852] 2 E. & B. 148.
(4) [1852] 2 E. & B. 160.
(5) I. R. 1 C. L. 283.
(6) 15 Q. B., at p. 1018.
(7) 6 T. R. 332.
(8) [1919] 2 I. R. 28.

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Book of Trinity College, and a paper of much interest, the fruit of personal research, by the Provost, reprinted from Hermathena, 1919, on Students and Tutors in former times. Little light is afforded by them to clear up the inside working of the College as a living organism. On some points for consideration there is no controversy. From the time of Charles I the corporate body was impressed with an exclusively Church character; it was the sole Irish University, as 14 & 15 Chas. 2, c. 2, sect. 219 (authorizing the erection of another college of the University, to be called the King's College), was never acted on. Roman Catholics got relief in 1793, and in the following year (1794) they and also Dissenters were allowed to be students. The statute 35 Geo. 3, c. 21, as Roman Catholics could not have a college of their own, authorized a special Catholic seminary or academy. The University as a corporation preserved its stamp of exclusiveness till 1873. Its Fellows save three were required to be in Orders, and its Foundation Scholars must have belonged to the Irish Church. Celibacy was imposed on Fellows, and on Scholars apparently as well—an obligation removed as to the former in 1840, and as to the latter in 1855. The Provost had enjoyed matrimonial liberty since 1811. The government of the University before the Letters Patent of 1 Geo. 5 was altogether in the hands of the Provost and seven Senior Fellows.

I now proceed shortly to review (with regard to considerations which may possibly be relevant as affecting the public nature of the institution) its personnel, its financial administration, and its schools. First, as to persons.

The College has at present seven orders of rank (omitting doctors and bachelors): 1, Provost; 2, Fellows; 3, Noblemen and sons of noblemen; 4, Fellow Commoners; 5, Scholars; 6, Pensioners; 7, Sizars. (See Calendar, p. 19.) The Provost and Senior Fellows were, under the Caroline Letters, c. iv, c. 4, the supreme authority. The latter alone possessed the corporate rights of Fellows. The Provost's salary, originally £100 a year, was raised afterwards to £200, then received additions—in 1722, £176; in 1758, £183; and in 1759, after Provost Baldwin's devise to the College, £236. His income and that of the Fellows in 1853 are set out in the Royal Commission Report of that date. He is appointed by the Crown. The Senior Fellows got at first £9 13*s.* 4*d.*,

afterwards raised to £30, with subsequent additions in 1722, £18 6*s.* 8*d.*, and in 1758, £51 3*s.* 4*d.* Each Junior Fellow received in 1637 £3, raised to £10, and increased in 1722 to £15, and in 1758 by £25. The total, £40 Irish, is still, as the Provost states in his monograph, already referred to, the stipend of a Junior Fellow as such. The Scholars were originally paid—natives, £3 (the same sum as the stipend of a Junior Fellow), and 10*s.* other Scholars. These sums were afterwards increased in 1722 and 1758, so that the natives had in 1758 £20. All Scholars were equalized in 1827, and now enjoy the same stipend, £20 Irish, or £18 9*s.* 3*d.* British currency. Ch. xxi of the Letters of Chas. 1 authorized, if the revenues of the College allowed, augmentation of salaries by the Provost and majority of the Senior Fellows, with consent of the Lord Deputy and Visitors. The increases made in 1722 were under this provision. Those in 1758 and 1759 were under Royal Letter only, the Crown dealing with the income of the trust property (including that from private benefactors) as subject to its disposition and not requiring the form of letters patent. In cases directly affecting Fellows and Scholars adversely, Letters Patent were issued; e.g. 1st December, 1858; 20th May, 1889. The election of Scholars, particularly natives, was under chaps. 5 and 21 of the Letters of Chas. 1 to be influenced by want of means, and heirs or heirs-apparent, in respect of inheritances exceeding £20, were excluded. It was, I suppose, owing to this that Fellow Commoners were not eligible—a disqualification removed between 1853, the date of the Royal Commission Report, and the decree of 1862. By decree, dated 25th May, 1846, with consent of the two Archbishops as Visitors, the Scholar's modest salary was subjected to four guineas deduction for tutor's fees—a deduction explained, if not justified, by the poverty element no longer being entertained. Next, as to ranks outside the corporate body: nobiles, filii nobilium, and Fellow Commoners; the first two paying four times, and the last twice, the fees of pensioners, in college and at degree. Chap. 10 of the Letters of Chas. 1 has a curious provision exempting noblemen from some punishments affecting Scholars and Pensioners. I have not found any nobiles in the recent lists, and filius nobilis is of rare occurrence. Viscount Adare appears in the Calendar of 1833. The nobilis filius or the eques, if thrifty, could

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escape fees by not matriculating as such. Nobles and their sons had the privilege of obtaining degrees per specialem gratiam, a favour taken away by the decree of 1858. Nobiles, filii, and Fellow Commoners could get ordinary degrees in a shorter time than Pensioners: Dixon, p. 193. Gold medals were established by decree in 1793, to be awarded on term examination marks. Taylor, in his History (1845), says that under this decree, referred to but not fully copied in the Calendar, a nobilis could have got a medal on eight terms' marks, a filius nobilis or eques (baronet) on ten terms' marks, but Pensioners required to pass the full time. Though, however, the nobilis and his son were nearly unknown, the Fellow Commoners represented a large and profitable portion of the Trinity flock, the Irish gentry being in the habit of so entering their sons as matter of family custom. There were over 200 in the Calendar of 1833, and 100 in that of 1850. Up to 1833 I would gather from the Calendars that Fellow Commoners got gold medals as a distinct and separate class from the Pensioners. The few advantages that nobiles, filii, and Fellow Commoners still enjoy in exchange for the larger payments they make are survivals of obsolete class distinctions copied from Cambridge. The additional fees cannot be accounted for by extra instruction. No Fellow Commoners find place in the Calendar of to-day, but it still invites them and nobilium filii to come in on the higher tariff. The baronet or eques once associated with the filius nobilis has disappeared as the subject of separate attention and financial interest. The element of poverty as a special recommendation for Scholars in chapters 5 and 21 of the Letters of Chas. 1 is now in practice disregarded as obsolete, as is shown by the admission of Fellow Commoners, whose numbers do not appear to have been recruited by the concession.

I turn now to finance, property, salaries, and fiscal administration of College revenues, investigated by the Royal Commission, and reported on in 1853—Judge Longfield, an ex-Fellow, being one of the members. The property represents grants from the Crown, from the Corporation of Dublin, and from private benefactors, such as Professor Baldwin; and the Provost has a particular estate appropriated to maintain his position. The chamber rents contribute a substantial sum. Dr. Stubbs gives a decree or resolution

under date November, 1662, of the Board, that all chamber rents should be taken by them, as they formed no portion of the College stock or revenue. It does not appear how long this appropriation continued, if it ever began. The fees paid by students also supply a considerable revenue. They are divided into two parts, eight guineas being distributed among the tutorial staff. The balance, now called decrements, is the subject of Sir John Mahaffy's interesting research monograph on students' fees. The tutors, under ch. 10 of the Caroline Letters, fixed their own fees or annual salary from pupils. As to the tutors' proportion, I need say nothing. The portion called decrements (originally "detriments" for wear and tear of the College and fines) at some time came to be appropriated by the Board, without any original authority disclosed in the College volumes, whether decree with consent of Visitors or Royal Letters. The right of the Board to take such decrements was recognized by decree of 18th December, 1858, with consent of the two Archbishops as Visitors, and by decree of 11th February, 1893, the variable share of decrements was replaced by a fixed sum for certain periods. There were no Crown Letters as to this. Another source of income, fines on renewals of leases, which would appear to belong to the Trust property, amounting to a large sum, were in like manner without any original apparent title taken by the Board, whose claim was accepted by the Crown in the Royal Letter of August 2nd, 1851, substituting £800 per annum for Provost and Senior Fellows each, in lieu of their respective shares of renewal fines. Two minor points were relied on as establishing private or personal profit. The first was that under the permanent financial rules of the tutorial system sons and brothers of Fellows and ex-Fellows were freed from tuition fees. Had this privilege represented a revocable gift from tutors, it would be quite legitimate; but it is made a permanent legal deduction from income binding all future Fellows. Whether the loss was borne by tutors or Senior Fellows out of decrements, or by Cista Communis, may be immaterial. The other matter was the charge for keys, for the use of the botanic garden, entitling persons to use the garden for private enjoyment. On these I do not express any concluded opinion. The appropriations of decrements and of renewal fines, recognized

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by the Crown, may not be private profit, but they exhibit some laxity of financial administration and control. To control the Board there was no effective audit. Under the Caroline Letters, ch. xix, the Bursar's annual account might be submitted to an auditor, who was to report to his principals, his pay being, under c. xxi, £6 13*s.* 4*d.* He was obviously, from the amount of pay, one of the Senior Fellows. By Royal Letters 18 Vict. an auditor was required to be appointed with the consent of the Visitors, and the annual accounts were to be transmitted to the Visitors. By decree of Board and Visitors of 18th December, 1858, in addition to the usual College auditor a second auditor, not a Fellow, was to be appointed by the Board to re-audit the accounts of the year preceding, and the annual balance sheet was to be open at stated times, to be fixed by the Provost, for the inspection of all Fellows. In consequence of increased duty, the salary of the auditor was in 1866 raised to £200. Was not this auditor the College or Fellow Auditor? The Calendar gives Dr. Louis Purser, S.F.T.C.D., the eminent classical scholar, and Mr. Leet as the present Auditors. The position of the latter is delicate in re-auditing an account previously audited by a Senior Fellow. The audit is of a domestic character, and is only required to be disclosed to Fellows. Subject to this audit, and to the control of the Crown and consent of the Visitors respectively, the College enjoyed fiscal autonomy. From the evidence before the Recorder, and documents produced by Mr. Russell and Mr. Cathcart, I find it difficult to form an accurate estimate of College revenues, and in particular as to the contents of the Cista Communis so often mentioned in argument. It received probably from time to time any surplus to be carried to reserve. There is a substantial credit surplus on the last account. Salaries of professors are assigned by the Board with consent of the Visitors; pensions to retiring Fellows on a scale were authorized in 1880. There is a Chancellor (who acts through his Vice-Chancellor) now elected by the Senate from three names proposed by the Board. The Senate, though a distinct corporation, has no initiative, being restricted to graces sent down to it by the governing body.

The Letters Patent of 1 Geo. 5 have made important changes, a new governing body having been created, to which the powers

previously exercisable by the Provost and Senior Fellows have, with certain limitations, been transferred. The new authority does not appear to have altered the features of College life and administration described by me as existing when they assumed office. The College enjoys self-government as regards fiscal and general administration, subject in certain cases to the Visitors' assent. The Chancellor has an independent power of approval or disapproval in matters of a graver character. By Letters Patent, 27th April, 1880, the Archbishop of Dublin was replaced as Visitor by the Lord Chief Justice, and since that date the Visitors have been judicial till, on the resignation of Mr. Justice Madden as Vice-Chancellor, the present Archbishop of Dublin, a distinguished ex-Fellow, was appointed his successor. The function of the Vice-Chancellor is of peculiar importance; he possesses, in the first instance, a power of approval or otherwise, not infrequently exercised. For many years the office was held by eminent Judges.

I now take up the scholastic system, which, it is argued, may be inconsistent with the College being conducted altogether for the public service. The Divinity School in its staff and teaching represents the Church of Ireland, a voluntary Church no longer connected with the State, and in the College Chapel the service of that Church is celebrated, the expenses of service, including music, repairs, heating, lighting, insurance, &c., being presumably defrayed by the College. Degrees in divinity (which I note can be obtained by a layman) are under the control of a prescribed court of ecclesiastical professors, subject to the approval of the Board. Special arrangements may be made by that body in their discretion for other denominations, but their schemes of teaching and examination must be approved of by the Board as well as by the Court of the denomination. The Regius Professor or his permanent deputy must be designated as an examiner. No such scheme has yet been sanctioned by the Board, and Roman Catholics could not be expected to propose a scheme to be so controlled, or to come in under one. This differential advantage given to Protestant students, considerable in number, is said to introduce an element of inequality fatal to the claim of the institution to be regarded as altogether of a public character. The divinity students are

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numerous. In the Book of Trinity College, 1892, Dr. Stubbs puts the figure of divinity testimoniums in 1880 at 2322: see p. 105. A further objection of the same type was alleged to be the special treatment of Magee College, a valuable Presbyterian institution, which was not itself entitled to exemption. This was said to violate the principle of equality, if equality is essential to exclusive public purposes and public service.

The above sketch of Trinity College in its development and its present character and operation will enable us to consider the application of our case law. The *Derry Bridge Case* (1) and the two harbour cases related to a bridge as a public highway and to ports (the latter a branch of Royal prerogative): *Foreman's Case* (2). Both were governed by statutes. They were for the benefit of the community in a material point of view, as regarded travel and commerce, and charges necessary for construction and maintenance were levied. Bridges were often the subjects of legislation, such as that over the Lee (26 Geo. 3, c. 28) and Derry Bridge (40 Geo. 3, c. 41). The *Pembroke Case* (3) extended the principle from physical advantages to an institution for education, established under 62 & 63 Viet. c. 50, for technical instruction, as defined by sect. 30, the pupils paying a small nominal fee. The final authority is the *Cork University College Case* (4). There, as in all the former cases, the foundation was statutory; it absorbed the Queen's College, built on Royal property; its funds came from the State; there was no right of distribution between members; though a Catholic atmosphere was contemplated, the College was to be unsectarian, and no public money could be applied to theology; the statutes were subject to Parliamentary disallowance; there was no fiscal autonomy; a public audit was required; all students paid the same fees and were of the same rank; its Chancellor, Vice-Chancellor, and pro-Vice-Chancellors are all elective. In all the statutory establishments the finance would be affected if rates were deducted. Trinity College differs widely. It was founded by the Crown, which still controls it; it has property from many sources, including the Corporation of Dublin and private benefactors, whose gifts in perpetuity were made legal

(1) I. R. 1 C. L. 283.
(2) L. R. 4 H. L. 266.
(3) [1904] 2 I. R. 429.
(4) [1911] 2 I. R. 593; [1912] 2 I. R. 328.

by being charitable; the distribution of its revenue and the scale of fees charged are in the hands of the governing body, with consent of Visitors, and the Crown has dealt with the income by Royal Letters, such as those of 1758 and 1759; special theological teaching is given; the only audit is domestic, not public; fees in College and for degrees may be varied, and they vary according to rank; its Provost is appointed by the Crown; its Chancellor is appointed by the Senate from the Board's list, and he names his own Vice-Chancellor, who can appoint his own deputy. Some of the above matters may not, taken alone, be decisive. There was no Parliamentary audit in the bridge and harbour cases, and such audit might be insufficient in dealing with a charity: *Attorney-General* v. *Corporation of Dublin* (1). On the other hand, obligation to audit and liability of statutes to disallowance would not be decisive as to an institution being on that account of a public nature: *Mayor of Essenden* v. *Blackwood* (2); but in its essence Dublin University is a charity, with self-government as to income, staff, and teaching. As a charity it is not exempt. It is not of the public nature which the Legislature impressed on the Pembroke Technical School and the Cork University College. It was as an educational charity that the North Wales University, based on statute, though rateable, escaped income tax: *R.* v. *Commissioners of Income Tax* (3). Unable to get relief under our valuation system as a charity, Trinity College cannot find safety by attempted identification of its charitable object with the public purposes and public service contemplated as conferring immunity in our legislation. The English decisions on public purposes previous to 1852, so far as they were not founded on non-occupation, were influenced by the view that the revenue was governed by statutory appropriation, making it unlawful to reduce the revenue by rates—a consideration which, if relevant in our Irish cases dealing with statutory establishments, is inapplicable to Trinity College, which can appropriate its income (as shown particularly in documents and renewal fines), and fix fees and salaries, without any legislative control or restriction.

(1) 1 Bligh N. S., at pp. 312, 334, 338. (2) 2 App. C., at p. 585.
(3) 100 L. T. N. S. 585.

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The remaining point for decision is as to particular buildings and ground alleged to come within the reasoning of the *Oxford Rate Case* (1), decided when the University was attached to the State Church, subject to tests, and before the *Mersey Docks Case* (2), and no longer law: *Greig's Case* (3), infra. There the University was treated as a separate entity, distinct from its Colleges. Trinity College is invested with the character of University. It is the same as the University, one and indivisible. One set of buildings, rooms, and grounds cannot be attributed to the College, another to the University. The entire hereditaments of the corporate body are used to earn its income and fees. The language of Lord Cairns and Lord Westbury in *Greig* v. *University of Edinburgh* (3), quoted with approval by Lord Atkinson in *Winstanley's Case* (4), seems decisive. I do not, therefore, examine the various buildings in detail. The library, however, may stand in a different and exceptional position. It is entitled to receive all published books; it is the most comprehensive library in Ireland, corresponding to that of the British Museum; and is practically open to all students and scholars from everywhere. It has stronger claims to exemption than the Graduates' Memorial.

This appeal, brought in order to obtain relief from rates hitherto levied without question, is probably accounted for by the exemption of the Cork University College. To ordinary intelligence, Dublin University, with its fine history and value to the nation, ought to be entitled to the like protection. Exemption conceded to others, but denied to it, would increase its burden of rates. Our decision, however, must be governed by the application to the institution of statute law, as expounded by authority. If the hereditaments were not altogether of a public nature, and occupied for the public service, when the Poor Law Act, 1838, the statute 6 & 7 Vict. c. 32, and the Valuation Acts were passed (as is my opinion), Fawcett's Act, 1873, the recent Letters Patent of the King, and the beneficent reforms and improvements which have done so much for the efficiency and extended usefulness of the University, do not enable us to declare that Trinity

(1) 8 E. & B. 184.
(2) 11 H. L. C. 443.
(3) L. R. 1 H.L. Sc. 348.
(4) 10 A. C., at p. 16.

College has acquired, and now possesses, the statutory prescribed qualifications for exemption by reason of the extension of its usefulness.

In view of diminution of revenue from the war, a ground on which I believe that Oxford and Cambridge have applied for State grants, it may be that Trinity College may, by legislation or some special subvention, be given relief so as to be put on equality, at least as regards rates, with the National University, the exemption of which not only confers a special benefit, but increases the burden of rates on Trinity College and all other occupiers.

In valuation lists, it would be better to follow the language of the statutes, "distinguishing" the immune hereditaments, as the word "exempt" may tend to misconstruction, and may be open to question.

KENNY J.:—

This case has been presented to the Court from one point of view only, namely, as to whether the buildings represented by Trinity College can be regarded as being altogether of a public nature and used for public purposes within the meaning of the Irish Rating and Valuation Statutes and the decided cases. The question of user for "charitable" purposes as distinguished from "public" purposes was discussed before the Recorder; but it was stated to us by counsel for the College that the argument based on that point would not be pressed. We have, therefore, only to determine whether on the findings of fact by the Recorder, as set forth in the "Case Stated," the buildings of Trinity College can be treated as buildings altogether "of a public nature" and used exclusively for "public purposes," as those statutory expressions have been interpreted by numerous authorities in this country. That Trinity College, which, in all but name, is synonymous with the University of Dublin, is a great institution of a public nature in its broadest sense goes without saying, and it is only in its statutory sense the word "public" has to be considered. It is an institution that from the date of its first charter to the present time has held high the lamp of education and learning, not only to those who were able to avail themselves of its teaching, but to

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the civilized world at large, and the contention in support of its liability to poor rates is one based, not on any depreciation of the value of its great academic purposes and work, but solely on the meaning which the line of decisions I have referred to has attached to the language of the statutes that govern the imposition of poor rate in Ireland. Those statutes have been discussed by the other members of the Court, and I shall refer to them in the briefest manner. They are the Irish Poor Relief Act of 1838 (1 & 2 Vict. c. 56), and the Irish Valuation Acts of 1852 (15 & 16 Vict. c. 63) and 1854. The sixty-third section of the Act of 1838 provides for exemption from poor rate of land or buildings "used for public purposes, except where any private profit or use shall be directly derived therefrom"; while the twelfth and sixteenth sections of the Valuation Act of 1852 add emphasis to the language of the Act of 1838 by, in the twelfth section, referring to "land or buildings used exclusively for public purposes as hereinafter specified," and in the sixteenth section by declaring that no hereditaments shall be deemed to be of a public nature within the meaning of this Act unless such hereditaments "shall be altogether of a public nature." The Valuation Act of 1854 (17 & 18 Vict. c. 8), sect. 2, further recognized the exemptions by directing the Commissioner of Valuation in making out the valuation lists to distinguish all hereditaments of a "public nature," and by declaring that all such hereditaments so distinguished should "so long as they should continue to be of a public nature and occupied for the public service" be deemed exempt from all assessment for the relief of the poor. The learned Recorder asks us on his findings and rulings, as disclosed in the "Case Stated," to say whether the hereditaments constituting Trinity College were of a public nature within the meaning of the Valuation Act of 1854. I think I am correct in extracting from the "Case" the following as the findings and rulings on which the opinion of the Court is required:—

1. That the College is possessed of large revenues entirely under its own control, free from all Parliamentary interference.

2. That the governing body of the College is not subject to outside interference.

3. That large sums are received for students' fees, which, with other income, are allocated by the governing body, and participated in by the Fellows, professors, and lecturers.

4. That up to 1873, when Fawcett's Act was passed, it was undeniable that the purposes of the College were confined to one class and one creed, and therefore that the purposes for which the College buildings were used could not be regarded as exclusively public in the statutory sense.

5. That some time after the passing of the Irish Local Government Act, 1898, the College, in the course of a legal proceeding as to rates, admitted its liability to poor rate; and

6. That the College still remains available only to the ordinary class of students who can afford to be trained to enter and secure its advantages, which advantages can only be obtained (except in the case of the sons of Fellows) by the payment of substantial fees.

The Recorder, so far as I can judge, based his opinion, upholding the liability of the College, mainly on the latter ground, and on the independent and uncontrolled position occupied by the College and its governing body. The other members of the Court have necessarily devoted so much of their judgments to the consideration of the record of the College as a great public institution since its foundation, of the position it now occupies in relation to public purposes, and of its present constitution in its academic and financial aspects, that it would be the merest repetition on my part were I to enter at any length into those matters. It is sufficient for me to say with reference to the questions of law submitted in the "Case Stated," that in all the Irish authorities where the question of the meaning and application of the words "used for public purposes," or "altogether of a public nature," or "used exclusively for public purposes," has arisen, it has been uniformly determined that the "user," essential in order to establish exemption, must be available for all the subjects of the realm; the "purposes" must be purposes in which every member of the community has an interest; and the premises must be used for the public benefit of the whole community, and not for the private or exclusive use of any members, or any particular class or section,

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of it. In that sense exemption was upheld in the *Derry Bridge Case* (1), the *Belfast Harbour Case* (2), the *Sligo Harbour Case* (3), and the *Pembroke Commissioners Case* (4). The *Cork College Case* (5) is to the like effect; but it is plain from the judgments both in the King's Bench and the Court of Appeal that the circumstance that Crown and Parliamentary control over the affairs of the College was contemplated by the statutes and charter under which it was established was an important factor in the case, and helped to bring it closer in principle to the operative grounds of the decision in the *Mersey Docks Case* (6).

In the *Limerick Case* (7), the Corporation Gas Works, carried on for the benefit of the citizens, were held not to be exempt, on the ground (inter alia) that merely a section of the public and not the public at large came within the advantages intended to be conferred. It is not without interest to note that Barry J., afterwards Barry L.J., in the course of his judgment, stated he would have been better pleased if on grounds of public policy and convenience the *Londonderry Bridge Case* (1) had been otherwise decided. The *Limerick Case* (7) was followed in the *Cork Corporation Case* (8) by the Court of Appeal, reversing the King's Bench decision, and holding that bath-houses erected by the corporation which were not available for the use of the public generally as of right, and were primarily intended for the use of the inhabitants of Cork, were not exempt, although any member of the public who complied with the by-laws was permitted to use them. The reasoning on which this series of cases is based has satisfied me that Trinity College does not come within the statutory exemption. Furthermore, the argument in favour of exemption derives no help from any suggestion of Crown or Government control. Its doors are no doubt open to the public generally, but the comparative magnitude of the fees and the special training, in the first instance, necessary for those who propose to enter, necessarily have the effect of confining its students to a very limited section of the public. Beyond that section

(1) I. R. 2 C. L. 577.
(2) [1897] 2 I. R. 516, 534.
(3) [1899] 2 I. R. 214.
(4) [1904] 2 I. R. 429.
(5) [1911] 2 I. R. 593; on Appeal, [1912], 328.
(6) 11 H. L. C. 443.
(7) I. R. 6 C. L. 420.
(8) [1916] 2 I. R. 77.

there is no obligation on the College to make provision. These considerations, in my opinion, show that the user of the College buildings is not a user by the public as of right, but is in a sense merely permissive. The governing body is subject to no control except that of the Visitors. It could, I apprehend, increase the students' fees or impose more stringent conditions for studentships; in fact, might, if it chose, render the section of the public for whom it provides its great scholastic advantages a still more restricted class than it is at present. I therefore concur in thinking that the College is not within the exemption.

My judgment deals with all the College buildings as one integer, including within its scope the library and the botanic gardens, which are accessories to the general purposes of the College.

Solicitors for appellants: *Maunsell, Darley, and Orpen.*

Solicitor for Dublin Corporation: *Ignatius J. Rice.*

Solicitor for the Commissioner of Valuation: *The Treasury Solicitor.*

M. G. E.

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ARBITRATION—STAYING PROCEEDINGS—*Contract containing arbitration clause—Action—Common Law Procedure Act (Ireland), 1856, s. 14—Bias of arbitrator—Questions of law—Questions outside the arbitration clause—Discretion.*] The plaintiffs in June, 1914, contracted to erect certain houses for the defendants. The contract provided that every dispute which might arise between the parties touching the construction of the contract, or as to the rights or liabilities of either party thereunder, or in any wise relating thereto, should be referred to the defendants' surveyor, whose decision should be final. Delay occurred in the completion of the houses, which the plaintiffs alleged was owing to the failure by the defendants to give the plaintiffs possession of

ARBITRATION—*continued.*
the sites within the stipulated time; the defendants alleged that the delay was in part the plaintiffs' fault, and that the failure by the defendants to give the plaintiffs possession of sites was owing to their compliance with the requirements of the military authorities after the outbreak of war. The defendants' surveyor had, during the progress of the works, written several letters to the plaintiffs, attributing to them delay in the carrying out of the works, and had subsequently stated that the defendants were not legally liable for losses occasioned by delay due to the war. There was a question of law on the construction of the contract as to the times at which the defendants were bound to give the plaintiffs possession of the sites. On motion by the defendants to stay the proceedings, and to refer the matters in dispute to the defendants' surveyor: *Held*, 1, That the defendants' surveyor was not disqualified to act as arbitrator. 2. That fundamental questions of law were involved which should be tried in an action. 3. (per Madden & Moore JJ.) That the matters in dispute were outside the arbitration clause. *Hogg & Sons* v. *Belfast Corporation* - - - - - K.B.D. 305

ARMY—MILITARY SERVICE—Absentee without leave—*Order of magistrate handing accused over to military custody—Jurisdiction.*] On the 14th September, 1918, *R* was brought before one of the Divisional Justices of the Police District of Dublin Metropolis as a person suspected of being an absentee without leave from the Army Reserve. The magistrate having heard evidence made an Order that he should forthwith be delivered into military custody. On an application to make absolute a conditional order for a writ of certiorari and for Habeas Corpus: *Held*, that the magistrate having found that the applicant was ordinarily resident in Great Britain, and an absentee

ARMY—*continued.*
without leave, had the jurisdiction to convict summarily, and (subject to any punishment he might give) to direct the accused to be delivered into military custody under sect. 154, sub-s. 4, of the Army Act, 1881 (44 & 45 Vict. c. 58); or, without convicting, to direct the accused to be delivered into military custody, observing, however, the provisions of the Military Service Act, 1916, s. 1 (2), as explained in *The King* v. *Jones*, [1917] 2 I. R. 7. *R.* (*Romney*) v. *Lupton and Burton* (1) [K. B. D. 131

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CORN PRODUCTION ACT, 1917 (7 & 8 *Geo.* 5, *c.* 46)—**Workman Prosecutor**—*Minimum wages—Proper complainant—Sects.* 4 (1), (2), 7, 17.] A workman employed in agriculture, being paid a less rate of wages than that fixed by the Corn Production Act, 1917 (7 & 8 Geo. 5, c. 46), sect. 4, issued a summons against his employer for arrears, and the justices dismissed the same without prejudice, on the ground that the workman should under sect. 7 have complained to the Agricultural Wages Board, by whom the proceedings under the Act should have been brought. *Held*, reversing the justices, that the workman was a proper complainant. *Buchanan, complainant*; *Osborne, defendant* - - K. B. D. 52

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1. CRIMINAL LAW—Bail pending remand in custody—*Military Service Acts*, 1916-17—*Absentee without leave—Jurisdiction of King's Bench Division.*] A magistrate made an order

CRIMINAL LAW—*continued.*
under the Military Service Acts, 1916–17, remanding in custody a person accused of being an absentee without leave from the Army Reserve, in order that the prosecution might make further inquiries. On an application to admit the accused to bail: *Held*, that the King's Bench Division of the High Court has jurisdiction, in a proper case, to admit an accused remanded in custody to bail; but the Court will be slow to overrule a magistrate who in his discretion has decided not to accept bail pending a remand. *The King* v. *Manuel Israelovitch* - - - - - - K. B. D. 47

2. CRIMINAL LAW — Murder — "Young person"—*Date of trial or date of crime— Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *secs.* 103 *and* 131—*Sentence.*] The accused was convicted of murder. When the crime was committed he had not attained the age of sixteen. At the date of trial the accused was more than sixteen years of age. *Held*, that the accused was not a "young person" within the meaning of the Children Act, 1908 (8 Edw. 7, c. 67), and that he might competently be sentenced to death. *The King* v. *Joseph Charles Fitt* - - - - - - CR. CA. R. 35

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DEED — Intention to defraud creditors — 10 *Chas. I, sess.* 2, *c.* 3 (*Ir.*)—*Bills of Sale (Ireland) Act*, 1879, 42 *&* 43 *Vict. c.* 50—"*Possession or apparent possession.*"] On the 17th August, 1914, the defendant, against whom the plaintiffs had obtained a judgment for the sum of £583 5*s.* 3*d.* (being the defendant's share of the joint liability of the plaintiffs and the defendant to the Provincial Bank), made a voluntary assignment of all the furniture in his residence to his wife. In pursuance of a writ of fi. fa. under the plaintiff's judgment, the sheriff seized the furniture which up to the seizure remained in the apparent possession of the judgment debtor. It was claimed by the defendant's wife as her absolute property under the assignment. At the date of the execution of the deed, the financial circumstances of the defendant were somewhat involved, but it was contended that he was in a position at that time to make a valid voluntary assignment. The plaintiffs' case was that the defendant was not, in fact, in such a position, and that the deed was void as a bill of sale under the Bills of Sale (Ireland) Act, 1879 (42 & 43 Vict. c. 50), s. 8. The Court decided on the facts (affirming the judgment of the King's Bench Division), that the deed was fraudulent within the meaning of the 10 Chas. I, sess. 2, c. 3 (Ir.). *Held* (per Ronan L.J.), that it was void as a bill

DEED—*continued.*
of sale by virtue of sect. 8 of the Bills of Sale (Ireland) Act, 1879, the chattels comprised in the bill of sale having remained "in the possession or apparent possession of the person making such bill of sale." *Sanders* v. *Crossley* - - APP. 71

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FRIENDLY SOCIETY—Dispute—Rules—*Right of Appeal—Decision of Justices—Jurisdiction —Friendly Societies Act*, 1896 (59 *&* 60 *Vict. c.* 25), *sect.* 68, *sub-s.* 1; *Collecting Societies and Industrial Assurance Companies Act*, 1896 (59 *&* 60 *Vict. c.* 26), *sect.* 7.] The rules of a friendly society provided that all disputes between the society and its members "shall be determined by a Court of summary jurisdiction." Section 68, sub-s. 1, of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), enacts that disputes "shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of Law or restrainable by injunction." Section 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), provides that in all disputes a member may, "notwithstanding any provisions of the rules of the society or company to the contrary, apply to the County Court or to the Court of summary jurisdiction, . . . and the Court may settle that dispute according to the provisions of the Friendly Societies Act, 1896." A dispute having been decided by justices in favour of a member, the society appealed from the decision to the Court of Quarter Sessions. The chairman and justices at Quarter Sessions dismissed the appeal on the ground that under the rules of the society, and sect. 68,

FRIENDLY SOCIETY—*continued.*

sub-s. 1, of the Friendly Societies Act, 1896, they had no jurisdiction to hear it. The society applied for a writ of certiorari to quash the decision of Quarter Sessions. *Held*, by the Court of Appeal (Sir James H. Campbell C. dissenting), affirming the King's Bench Division, that there was a right of appeal. Where jurisdiction is given directly by a statute to one of the ordinary tribunals of the country, such as a Court of summary jurisdiction, the Justices exercising the jurisdiction act not as arbitrators but as a Court, to whose decisions appeal and certiorari apply, unless excluded by express provision. Sect. 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, gives a statutory right of recourse to a Court of law with all its incidents, including the right of appeal. *R.* (*Muginnis*) v. *Waterford Justices* [App. 213

GAMING AND WAGERING — **Unlawful gaming—Automatic machine**—*Game of skill—Chances not alike equal to all players—Personality of players—Children—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 2—*Gaming Houses Act*, 1854 (17 & 18 *Vict. c.* 38), *s.* 4.] The appellant was convicted under the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), of using his premises for the purpose of unlawful gaming being carried on therein. Proof was given of the user on the appellant's premises of an automatic gaming machine so constructed that a person might by practice attain such dexterity in manipulating it that his skill might make his chances even with or superior to the chances in favour of the machine. When the persons resorting to the premises where such a machine was kept acquired such skill, it was removed elsewhere. The machine was used for gaming by children of tender years not possessing skill in manipulating it. *Held*, that the question whether the chances of a game are "alike favourable to all the players," under the Gaming Act, 1845, sect. 2, does not depend on the abstract character of the game irrespective of the personality and capacity of the players and the conditions of the game, and that the defendant was properly convicted. *Forsythe* v. *Ross* [K. B. D. 335

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JUSTICES' JURISDICTION—PETTY SESSIONS—Sureties for the peace and good behaviour — *Summary jurisdiction — Criminal Justice Administration Act*, 1914 (4 & 5 *Geo.* 5, *c.* 58)—*Right to call witnesses—Insufficiency of evidence—Power of superior Court to examine evidence.*] An information having been sworn that the prosecutor *R.* used threats towards *W.* and others calculated to provoke a breach of the peace and to put *W.* in fear, a justice issued a warrant on which *R.* was arrested, and brought before the justice sitting in the local Petty Sessions courthouse. Evidence was there given by *W.* of the use of the threatening language complained of, and by a sergeant of police that the prosecutor was a man of bad character, that three named persons had refused to employ him on account of his bad character, and that on a certain date at the Dublin City Commission he had been convicted of sheep-stealing, and had pleaded guilty to cattle-stealing. After hearing the evidence the justice made an Order requiring the prosecutor to enter into recognizances with two sureties to keep the peace, and be of good behaviour for a term of twelve months, and in default of such sureties and entering into such recognizances, to be imprisoned for six months. This Order purported to be made under statute 34 Ed. 3, c. 1. On an application for a writ of certiorari to quash the Order, *Held*, 1. That the justice was sitting as a Court of summary jurisdiction, and that the prosecutor was entitled, under the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), to call witnesses: *R.* (*Garvey*) v. *Armagh Justices*, [1918] 2 I. R. 94, overruled. 2. That when a justice is sitting as a Court of summary jurisdiction, and the accused can call evidence, and the Order of the justice shows on its face facts necessary to give jurisdiction to make the Order, it cannot be quashed on the ground of the insufficiency of the evidence. *R.* (*Orr*) v. *Londonderry Justices*, 28 L. R. Ir. 440, distinguished. *R.* (*Redmond*) v. *Jellett* [K. B. D. 79

KNOWLEDGE as to person committing a malicious injury — Information — Essential averments - - - - 414
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LABOURERS (IRELAND) ACTS—Improvement scheme — *Preferential right — Labourer's right of action—Temporary letting of plot to a person not an agricultural labourer—Breach of statutory duty—Labourers (Ireland) Act*, 1886, *s.* 15; *Labourers (Ireland) Act*, 1906, *s.* 29.] A rural district council made an improvement scheme under the Labourers Acts based upon a representation signed by, or on behalf of, agricultural labourers, amongst whom was the plaintiff, whose representation was in respect of a cottage and about an acre of land. Regulations in pursuance of section 29 of the Labourers (Ir.) Act, 1906, were framed and adopted by the council. Pending the erection of the cottage, the council, acting under sect. 15 of the Labourers (Ir.) Act, 1886, made a temporary letting of the plot to a farmer who had not signed a representation, whereupon the plaintiff claimed damages on the ground that they were bound to give him a preference. *Held*, by the King's Bench Division (Sir James Campbell C.J. and Dodd J.) (following *Tevlin* v. *Lisnaskea Rural District Council*, [1914] 2 I. R. 15), that a temporary letting under sect. 15 of the Labourers (Ir.) Act, 1886, is a letting of an allotment within sect. 29 of the Labourers (Ir.) Act, 1906, and that the plaintiff was entitled to a preferential right thereto. *Held* by the Court of Appeal, reversing the King's Bench Division, that the preferential right given by sect. 29 of the Act of 1906 applies only to the letting of a cottage and plot as one entity, and does not apply to a temporary letting under sect. 15 of the Act of 1886. *Held*, also, that the statutory preference given to a labourer who has signed a representation is only a right to be preferred, caeteris paribus, to agricultural labourers who are not representators, and is not absolute. *Tevlin* v. *Lisnaskea Rural District Council*, [1914] 2 I. R. 15, overruled. *Quaere*: Whether a personal claim for damages by a labourer can be sustained where there is a breach of statutory obligation on the part of a council in the letting of a cottage and plot. *M'Daid* v. *Milford Rural District Council* (1) - [K. B. D. APP. 1, 11

1. **LANDLORD AND TENANT — Action for recovery of land — Irish Land Commission as landlords—Non-payment of rent—Remedy—*Powers—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *sects.* 6, 18, *and* 19.] Where the Land Commission acquire an estate under sect. 6 of the Irish Land Act, 1903 (3 Edw. 7, c. 37), they may, exercising the powers of landlords, proceed against a tenant who has failed to sign an undertaking to purchase his holding by way of ejectment for non-payment of rent. *Irish Land Commission* v. *Forde* - - H. L. 18

2. **LANDLORD AND TENANT — Subdivision under verbal agreement** — *Judicial tenancy—No consent by landlord—Possession—Part performance — Enforceable contract — Land Law (Ireland) Act*, 1881, *sect.* 5, *sub-s.* 3—*Purchase of Land (Ireland) Act*, 1885, *sect.* 8—*Purchase by tenant—Real Property Limitation Act*, 1833 (3 & 4 *Wm.* 4, *c.* 27), *sect.* 3.] In December, 1902, *A*, the occupier of a holding held under a judicial tenancy, by a verbal agreement, to which neither then nor subsequently was the landlord's consent obtained, gave *B*, one of the defendants, a plot of ground forming part of the holding for the entire of *A*'s estate and interest therein. In April, 1903, *B* entered into possession of the plot, built a shop together with out-offices upon it, and remained in continuous possession, without paying any rent, down to the commencement of the action in December, 1917. In 1906 *A* entered into an agreement with his landlord to purchase the holding under the Land Purchase (Ireland) Acts; and on February 25th, 1915, the holding was by fiat of the Land Commission vested in *A*'s successor in title. In December, 1917, the plaintiff, as successor of *A*, issued a writ against the defendants for recovery of possession of the premises. The jury found that the plaintiff's predecessor had promised to give the plot of ground absolutely to the defendants. Upon the finding of the jury judgment was at the trial entered for the defendants. *Held*, by the King's Bench Division (Gibson, Dodd, and Moore JJ.), that subdivision being illegal under sect. 5, sub-s. 3, of the Land Law (Ireland) Act, 1881, there was no enforceable contract, and that the defendants had not acquired a title under the Statute of Limitations. *Held*, by the Court of Appeal, reversing the King's Bench Division (Sir James H. Campbell C. dissenting), that the contract was lawful, and was, in its nature, capable of being specifically enforced against the plaintiff. *Held* (affirming the King's Bench Division), that no title to the fee had been acquired by the defendants under the Statute of Limitations, as they had not been twelve years in possession when the fee simple was vested. *O'Regan* v. *White* - - - [APP. 339

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LOCAL GOVERNMENT—POLICE—Belfast Police Force—"*Free quota*" *and* "*extra police*"—*Allocation of* "*extra police*"—28 & 29 *Vict. c.* 70, *s.* 6—*Jurisdiction to award costs to or against the Crown.*] It is the duty of the Belfast City Council to make and levy a rate sufficient for the payment of the amount certified by the Inspector-General of the Royal Irish Constabulary to be chargeable against the Borough of Belfast under the Constabulary (Ireland) Amendment Act, 1865 (28 & 29 Vict. c. 70, sect. 60), for the cost of the extra police force allocated to the police district of Belfast, notwithstanding that the total "free quota" of 10,006 men for all Ireland provided for by that Act has not been allocated. Peremptory mandamus to the defendants to make and levy such a rate granted with costs. The Court has jurisdiction in cases where the circumstances justify such an order to award costs to or against the Crown. Circumstances which would justify such an order considered. *In re Madden's Estate* ([1902] 1 I.R. 63) distinguished. *R.* (*Byrne*) v. *Belfast Corporation* [K. B. D. 143

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1. MALICIOUS INJURY—**Information—Essential averments**—*Knowledge as to person committing injury—Grand Jury* (*Ireland*) *Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 137.] In his examination upon oath under sect. 137 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), to ground an application for malicious injury to property the deponent must specify whether he knows or does not know the person or persons who committed the injury; and a statement that a certain person had been remanded to jail on the charge of having committed the offence is not a compliance with the section. *Shaw* v. *Wicklow and Baltinglass No.* 1 *Rural District Council* - - - - - - APP. 414

2. MALICIOUS INJURY — Lease of Chattel—*Hire-purchase agreement*—"*Belonging to*" *and* "*person so injured*"—*Grand Jury* (*Ireland*) *Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 135; *Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 5.] A traction engine in the possession of a person, called the tenant, under a hire-purchase agreement, was maliciously injured. Under the terms of the agreement the tenant was to keep the engine in good and substantial repair, and upon payment of all rents due it was to become his property; but subject to this provision it was to remain the sole property of the company from which it was hired. The tenant applied for compensation for malicious injury. *Held*, that a lease of a chattel can validly be made; that under the terms of the agreement the applicant was a lessee of the engine; and that being such lessee the engine "belonged" to the applicant within the meaning of sect. 135 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), and that he was entitled to claim and recover compensation as a person injured. *Sheane* v. *Wicklow County Council* - - - - APP. 115

MALICIOUS PROSECUTION—**Reasonable and probable cause**—*Malice—Finding of jury.*] In an action for damages for malicious prosecution, a jury found that the defendant honestly believed that the plaintiff was guilty of the offence with which he had been charged, but that the defendant was actuated by malice in prosecuting the plaintiff. *Held*, that, the defendant's honest belief not being in the circumstances reasonable, the finding of malice was sufficient to entitle the plaintiff to succeed. *Cruise* v. *Burke* [K. B. D. 182

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MINIMUM WAGES—Workman—Prosecutor [52
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NEGLIGENCE—**Joint negligence of driver of tram and driver of coach**—*Collision—Questions for the jury.*] The plaintiff sustained personal injuries in a collision which took place between a hired coach in which she was travelling, and the driver of which was not under her control, and a tramcar. In an action for damages against the tramway company, the plaintiff alleged, amongst other acts of negligence on the part of the driver of the tramcar, that when he became aware of the plaintiff's danger he took no steps to avoid causing injury. In answer to specific questions put to them at the trial, amongst others, the jury negatived negligence on the part of the driver of the tramcar, and found negligence on the part of the driver of the coach, and that the accident was caused by such negligence; but no question relating to the joint negligence of the two drivers was left to the jury, the learned Judge at the trial in his report stating that he refused to put this question, as he considered it would confuse the jury, and that having so refused, he did not discuss with the jury the question of joint negligence

NEGLIGENCE—*continued.*
On these findings judgment was entered for the defendant company. On an application by the plaintiff for a new trial, *held*, by the Court of Appeal, affirming the decision of the King's Bench Division, that a specific question relating to the issue of joint negligence ought to have been left to the jury, and that there should be a new trial of the action. *Lynam and others* v. *Dublin United Tramways Company.* K. B. D.; APP. 445, 460

NEGLIGENCE—Quarry—Absence of fence *—Duty to fence—Continuing liability.*] The plaintiff was owner and occupier of the surface of certain lands on which there was an unfenced quarry, the mining rights in which were leased to the predecessor in title of the defendants. These rights passed by will to the defendants, who paid the rent reserved by the lease, but did not work the mine, and left it in the unfenced condition in which they found it. One of the plaintiff's bullocks fell into the quarry and was killed. *Held*, that the plaintiff was entitled to recover damages from the defendants for the loss of his bullock, there being a continuing liability on the part of the defendants to keep the quarry so as not to be a danger and a nuisance to their neighbour. *M'Morrow* v. *Layden and Others* K. B. D. 398

NON-PAYMENT OF RENT—Action for recovery of land for, by Irish Land Commission - - - - - - 248
See LANDLORD AND TENANT. 2.

NUNCUPATIVE WILL—Mariner or seaman being at sea - - - - - 404
See PROBATE—GRANT OF.

OBJECTION to claimant for Parliamentary and Local Government Franchise—Omnibus objection bad - - - - - 419
See PARLIAMENT—FRANCHISE.

PARLIAMENT—FRANCHISE—Registration—Omnibus objection *—Practice—Representation of the People Act*, 1918 (8 *Geo.* 5, *c.* 64.] A duly qualified parliamentary elector who objected to a number of persons whose names appeared as claimants in the list of claims (parliamentary and local government), published by the registration officer, sent one notice of objection to the registration officer, including all possible grounds of objection in respect of both franchises, and in place of inserting the name of one individual as objected to in the body of the notice, he added a schedule consisting of the list of claims as published by the registration officer, with the names of persons to whom no objection was taken struck out. *Held*, that the notice of objection was bad, and that a specific notice of objection should be sent in respect of each claim objected to, whether in respect of the parliamentary or the local government franchise. *Sinclair* v. *O'Kane and others* - - - - - - APP. 419

POLICE—Free quota—Belfast Police Force 143
See LOCAL GOVERNMENT—POLICE.

POOR RATE—Increase of rent in respect of increase of - - - - - 244
See WAR—EMERGENCY LEGISLATION. 3.

1. **POOR-RATE—OCCUPATION—Fishery—Rateability** *—Owners in possession—No profit from fishery—"Immediate use or enjoyment"—Poor Relief (Ireland) Act*, 1838 (1 *& 2 Vict. c.* 56), *ss.* 61, 63, 124.] The Congested Districts Board, a statutory corporation, acquired, in the exercise of their powers, an estate including fishing rights. In a civil bill action brought to recover poor rate in respect of these fishing rights it was proved that the Board had formerly let the fishing at a yearly rent, but during the period covered by the rate sued for they were unable to let it, and, as a commercial undertaking, they could only work it themselves at a loss. They employed men for the purpose of watching the fishery. *Held* (affirming the King's Bench Division), that the Board were in the "immediate use or enjoyment" of the fishery, and liable, as occupiers, for rates; that the true test of beneficial occupation is not whether a profit can be made, but whether the occupation is of value. *O'Malley* v. *Congested Districts Board* [APP. 28

2. **POOR-RATE—OCCUPATION—Liability of person in occupation, but not rated** *—Person rated not in occupation—1 & 2 Vict. c.* 56, *ss.* 61, 71.] At a time when a poor-rate was made in respect of certain lands, the person rated was not in occupation of the premises, but when the rate was made and during the whole of the period for which it was made, the defendants were in occupation. *Held*, that the defendants were not liable for the rate. *Donegal County Council* v. *M'Crossan* [K. B. D. 88

PRACTICE—ALIMONY—Action to recover arrears of.] Arrears of permanent alimony payable under an order of the High Court of Justice in Ireland, King's Bench Division (Matrimonial), cannot be recovered by action. *Nunn* v. *Nunn* (6 L. R. I. R. 115, and 8 L. R. I. R. 298) discussed and distinguished. *Held* also, that the action was an abuse of the process of the Court. *Keys* v. *Keys* - - - - - - K. B. D. 160

PRACTICE — COSTS — Action for tort — Separate causes of action—*Verdict for £5 upon each cause of action—Taxation—R. S. C., Order 65, r. 4; Order 18, r. 1.*] For the purpose of determining whether a plaintiff in an action for wrong or injury disconnected with contract has or has not recovered a sum exceeding £5 within the meaning of R. S. C., Order 65, r. 4, the aggregation of separate causes of action included in the same proceedings is permissible. The plaintiff brought an action for assault and false imprisonment. Issues as to assault and false imprisonment, and questions as to the damages for each, having been left to the jury, they awarded the plaintiff the sum of £5 damages on each issue. *Held*, by the King's Bench Division, and affirmed by the Court of Appeal, that the plaintiff had recovered a sum exceeding £5 within the meaning of Order 65, r. 4, and that the Taxing Master was right in taxing the costs upon this basis. *Myers* v. *Phelan*, 26 L. R. Ir. 218, discussed. *Donnelly* v. *Verschoyle and Another*
[K. B. D. App. 101, 114

PRACTICE—RECEIVER—Equitable execution—*Motion Ex parte.*] Application for the appointment of a Receiver by way of equitable execution should be by motions ex parte, and not on notice, except in pension cases. *Campbell* v. *Usher* (2) distinguished. *Flannery* v. *Ryan*
[K.B.D. 338

PRACTICE—Service out of jurisdiction—*Insurance Policy—Defendants resident in England—Completion of contract—Order XI, rule 1 (f).*] The plaintiff, a person carrying on business in Dublin, made a proposal through Dublin brokers for a policy of insurance known as a "Dreadnought policy." The proposal was transmitted by the brokers to the defendants in London; and ultimately a policy was issued and posted by them to the brokers for delivery to the insured. The plaintiff, who was not personally aware of the conditions, submitted that the policy included conditions not contained in the proposal, and that the contract was not completed until he had, after the receipt of the policy from the brokers, signified acquiescence by accepting it. *Held*, that the brokers had full authority from the plaintiff to negotiate for, and effect on his behalf, the particular policy in question, that the conditions usually contained in such a policy were well known to them, that the plaintiff through them received the precise form of policy for which he had bargained, and that as the contract was completed by the signing and posting of the policy in London, leave to issue and serve a writ out of the jurisdiction should not be given. *Sanderson* v. *Cunningham* App. 234

PRINCIPAL AND SURETY—Conditional undertaking *in writing to pay debt of another—Promissory note—Guarantee—Release of surety by giving of time to principal—Consent to giving of time.*] The defendant, amongst other signatories, signed an instrument whereby, in consideration of the plaintiffs advancing to *P.* and *R.* the sum of £140, he, jointly and severally with the other signatories, undertook to pay the plaintiffs the said sum, with the usual rate of bank interest, within six months from the date of the instrument. The plaintiffs subsequently advanced to *P.* and *R.* the sum agreed upon, taking from them promissory notes for the payment thereof, which notes were renewed from time to time without the express consent of the defendant. *Held* by the House of Lords, affirming the decision of the Court of Appeal in Ireland ([1918] 2 I. R. 521), that the instrument was a guarantee, that the plaintiffs had not discharged the onus of proving consent by the defendant to the giving of time to the principal debtors, and that the defendant was entitled to a direction at the trial. *Provincial Bank of Ireland* v. *Fisher* - - - - - - H. L. 249

PROBATE—GRANT OF—Nuncupative will—*Captain of steamer—Document written on shore between sailings—"Mariner or seaman being at sea"—Wills Act (1 Vict. c. 26), sect. 11.*] The deceased was a captain in the mail service, and commanded the s.s. "Leinster" during its cross-Channel voyages between Holyhead and Kingstown. He was actually at sea for the time each day spent in transit. He was on shore for the remainder of each day. He had a house at Holyhead where he and his wife and family lived. His testamentary disposition was contained in a document purporting to be a will which he signed at his house at Holyhead between voyages. The deceased was drowned when the "Leinster" was sunk. *Held*, that the deceased was a "seaman," but was not "a seaman being at sea" within the meaning of sect. 11 of the Wills Act (1 Vict. c. 26), when he signed the said document purporting to be his will. *Barnard* v. *Birch* - Dodd J. 404

PROBATE—PRACTICE—Principle of dependent relative revocation applied on motion - - - - - - 485
See Will—Revocation.

PROMISSORY NOTE—Conditional undertaking to pay debt - - - - 249
See Principal and Surety.

PUBLIC AUTHORITIES PROTECTION ACT, 1893 (56 & 57 *Vict. c.* 61)—*Tort—Malicious abuse of authority—Conspiracy.*] In 1889 *N.* was appointed Inspector of National

PUBLIC AUTHORITIES PROTECTION ACT—*continued.*
Schools at a progressive salary "on the usual conditions," and to hold the position "during the pleasure of the Commissioners." Having been reprimanded on several occasions, he was deprived of increments of salary, suspended, and finally compelled to resign on a diminished retiring allowance. In an action brought by *N.* against *S.*, the Resident Commissioner of National Education, claiming damages for maliciously procuring and conspiring with others to procure the infliction on the plaintiff of alleged wrongs, whereby his position and salary were prejudicially affected, and which finally resulted in his enforced retirement: *Held* by the House of Lords, affirming the decision of the Court of Appeal and the King's Bench Division, refusing to set aside the judgment directed by Kenny J. to be entered for the defendant, that the Commissioners of National Education were a public authority, that their officers had duties to perform of a public nature, and that the Commissioners and their subordinates in an action for torts alleged to have been committed by them in carrying out their duties were entitled to rely upon the protection afforded by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 6). Per Lord Finlay, the provisions of the Act as to (*a*) limitation, (*b*) solicitor and client costs, (*c*) tender of amends, and (*d*) failure of the plaintiff to give the defendant opportunity of tendering amends, are independent provisions; and the enactment with reference to costs as between solicitor and client applies in the case of any action which falls within the terms of the Act, whether it fails on the ground of time or on any other ground. *Newell* v. *Starkie* H. L. 325

PUBLIC HEALTH ACTS—Repairs to street not repairable by inhabitants at large—*Appeal against "requirement"—"Decision"—Order of Recorder allowing Appeal—Certiorari—Jurisdiction of Recorder to hear Appeal.*] An appeal by a person aggrieved from a notice by a local authority under sect. 19, sub-s. 1, of the Public Health Acts Amendment Act, 1907 (7 Ed. 7, c. 53), requiring an owner to execute certain repairs to a street, lies to the Court of Quarter Sessions, and not to the Local Government Board. *R.* (*Corporation of Belfast*) v. *The Recorder of Belfast* [K. B. D. 171

PUBLIC PURPOSES—Buildings of a public nature - - - - - - 493
See RATES—EXEMPTION.

QUARRY—Duty to fence—Continuing liability [398
See NEGLIGENCE.

RATES — EXEMPTION — Building of a public nature *or used for public purposes—Trinity College, Dublin—Freedom from external control—15 & 16 Vict. c. 63, ss. 15 and 16—17 & 18 Vict. c. 8, s. 2.*] Trinity College, Dublin, provided university education, and was open to all members of the public, subject to the payment of certain fees. The College was free from all external control, as regards its government, teaching, and finance. *Held*, that the buildings of the College were not of a public nature or used exclusively for public purposes, and were not exempt from assessment under the Irish Rating and Valuation Code. *Trinity College, Dublin*, v. *The Commissioner of Valuation.* - - - - - K. B. D. 493

RECEIVER by way of equitable execution 338
See PRACTICE—RECEIVER.

REGISTRATION — Omnibus objection to claimant for Parliamentary and Local Government Franchise bad - 419
See PARLIAMENT—FRANCHISE.

REPAIRS to street—Appeal from requirement of local authority - - - 171
See PUBLIC HEALTH ACTS.

REVENUE—EXCESS PROFITS—"Special circumstances"—*Finance (No. 2) Act*, 1915 (5 & 6 *Geo.* 5, c. 89), *schedule* 4, *part* 1, *clause* 5—*Appeal—Exclusive jurisdiction of commissioners.*] The determination of special circumstances and of the allowances to be made in relation thereto under clause 5 of part 1 of schedule 4 of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), is a matter for the discretion of the Commissioners of Inland Revenue, and no appeal lies from their decision. *Inland Revenue Commissioners* v. *Auld, Pemberton, & Co.* - - - - - - K. B. D. 66

REVENUE—INCOME TAX—Land Purchase Acts—"Annuity payable"—*Reduction of purchase annuity—Finance (No. 2) Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *sect.* 22 (2) (*c*).] "Annuity" and "Land Purchase Acts" have the same meaning in sect. 22, sub-s. (2) (*c*), of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), as in the Land Purchase Acts. Even though an annuity has been reduced under sect. 24 of the Land Law (Ireland) Act, 1887 (50 & 51 Vict. c. 33), or under sect. 25 of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), the reduced amount is the "annuity" for the purposes of the above sub-section, and will be taken as the basis for the calculation of income tax thereunder. "Annuity payable" under sect. 22, sub-s. (2), cannot be read to mean "annuity originally fixed." *Corcoran* v. *Judge* [K. B. D. (R.) 60

REVOCATION—Dependent relative—Printed form of will containing clause of revocation - - - - - - - 485
See WILL—REVOCATION.

ROYAL IRISH CONSTABULARY—Belfast Police Force—Free quota - - 143
See LOCAL GOVERNMENT—POLICE.

RULES AND ORDERS—R. S. C., 1905—Order 11, Rule 1 (f) - - - 234
See PRACTICE—SERVICE.

—— R. S. C.—Order 18, Rule 1 - - 101
See PRACTICE—COSTS.

—— R. S. C.—Order 65, Rule 4 (amount recovered) - - - - - 101
See PRACTICE—COSTS.

SEAMAN being at sea - - - - 404
See PROBATE—GRANT OF.

SEDUCTION—Service with another *under contract with parent—Action by parent.*] The plaintiff's daughter, a young girl, living with him, having been hired by the defendant from the plaintiff under three successive yearly contracts as domestic servant, was seduced by him in the second year's service (1916), and intercourse having been renewed in the third year (1917), gave birth in the workhouse to a child. The jury having found that the defendant hired the girl with the object of seduction and also as domestic servant: *Held*, per Gibson J., that the principle of *Speight* v. *Oliviera* (2 Starkie, 493) applied, and that the contract of service was as against the plaintiff invalid. *Held*, also, that an objection that the pleading did not specifically rely on the principle of *Speight* v. *Oliviera* in the circumstances failed; and also that in assessing damages the jury might consider the circumstance that the infant was living and in the plaintiff's house, though there was no legal obligation on the plaintiff to maintain it. *Speight* v. *Oliviera* (2 Starkie, 493) considered. *Flynn* v. *Connell* K. B. D. 427

SEPARATE CAUSES OF ACTION—Verdict for £5 upon each—Amount recovered [101
See PRACTICE—COSTS.

SERVICE—Contract of - - - 427
See SEDUCTION.

SHIP AND SHIPPING—Contract—Demurrage—*Charter-party and bill of lading—Delivery of cargo without production of bill of lading—Detention at port of discharge—Demurrage—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *sect.* 18.] On June 26th, 1915, the defendants, *W. Bros.*, coal merchants in Dublin, entered into a contract for the purchase of a quantity of coal from *R. & Sons*, a Glasgow firm. The contract note contained no reference to demurrage; but in a letter of the same date to the vendors, the defendants intimated that they were prepared to pay a reasonable rate of demurrage. It was provided by the contract that the coal was to be supplied c. i. f. to Dublin, steamers to be discharged in twenty-four running hours from arrival. In pursuance of their contract with the defendants, *R. & Sons* entered into a charter-party, dated the 6th July, 1915, and executed later with *M'K.*, the plaintiff, for the carriage of the coal by one of his ships to Dublin. The charter-party contained the usual conditions, including a cesser and lien clause, and provided that demurrage at the rate of 15*s.* per hour should be paid for detention over the specified time of twenty-four running hours. The plaintiff did not execute the original contract, and the defendants were not expressly parties to the contract of affreightment with the shipowner. The vessel arrived in Dublin on the 11th of July, and the discharge of the cargo was completed on the afternoon of July 14th, thirty-six hours after the expiration of the time stipulated for discharging. A bill of lading, incorporating the provisions of the charter-party, was prepared on July 12th, signed by the plaintiff on the 13th, and posted by the shippers on the 14th to the defendants, who duly received it on July 15th, when the vessel had completely discharged her cargo, and had left the port of Dublin. In these circumstances the plaintiff sued the defendants for demurrage. *Held*, by the King's Bench Division (Sir James H. Campbell C.J. and Madden and Dodd JJ.), reversing the decision of Gibson J., that the cargo was delivered by the ship and accepted by the defendants under the bill of lading, and upon the terms that they should pay demurrage to the shipowner at the rate agreed upon between him and the consignors. *Held*, by the Court of Appeal (reversing the King's Bench Division and restoring the judgment of Gibson J.), that as soon as the coal had been put on board the vessel at Glasgow there was an unconditional appropriation under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sect. 18; that the property then passed to the defendants; that it did not pass by the bill of lading; and that there was no contract by the defendants to pay demurrage to the plaintiff. On appeal to the House of Lords, *Held*, that the respondents were not bound by the terms of the bill of lading incorporating the charter-party, as the cargo had not been received or accepted by them thereunder. *M'Kelvie* v. *Wallace*

[K. B. D. 250; APP. 269; H. L. 304

SPECIAL CIRCUMSTANCES — Allowance for—Discretion of Inland Revenue Commissioners - - - - - 66
See REVENUE—EXCESS PROFITS.

SPECIFIC PERFORMANCE — Verbal contract to sell lands forming part of judicial tenancy - - - - - 339
See LANDLORD AND TENANT. 1.

STATUTES—10 Chas. I, Sess. 2, c. 3, Ir. 71
See DEED.

—— 3 & 4 Will. 4, c. 27, s. 3 - - 339
See LANDLORD AND TENANT.

—— 6 & 7 Will. 4, c. 116, s. 135 - - 115
See MALICIOUS INJURY. 2.

—— —— s. 137 - - - - - - 414
See MALICIOUS INJURY. 1.

—— 1 Vict. c. 26, s. 11 - - - - 404
See PROBATE, GRANT OF.

—— 1 & 2 Vict. c. 56, ss. 61, 63, 124 - 28
See POOR RATE—OCCUPATION.

—— —— ss. 61, 71 - - - - - 88
See POOR RATE—OCCUPATION.

—— 8 & 9 Vict. c. 109, s. 2 - - - 335
See GAMING AND WAGERING.

—— 10 & 11 Vict. c. 34 (Towns Improvement), s. 181 - - - - - - 244
See WAR—EMERGENCY LEGISLATION. 3.

—— 15 & 16 Vict. c. 63, ss. 15 and 16 - 493
See RATES—EXEMPTION.

—— 17 & 18 Vict. c. 8, s. 2 - - - 493
See RATES—EXEMPTION.

—— 17 & 18 Vict. c. 38, s. 4 - - - 335
See GAMING AND WAGERING.

—— 19 & 20 Vict. c. 102, s. 14 - - 305
See ARBITRATION — STAYING PROCEEDINGS.

—— 28 & 29 Vict. c. 70 (Constabulary, Ir.) 143
See LOCAL GOVERNMENT—POLICE.

—— 42 & 43 Vict. c. 50, s. 8 (Bills of Sale) 71
See DEED.

—— 44 & 45 Vict. c. 49, s. 5 - - - 339
See LANDLORD AND TENANT. 2.

—— —— c. 58, s. 154 - - - - - 131
See ARMY—MILITARY SERVICE.

—— 48 & 49 Vict. c. 73, s. 8 - - - 339
See LANDLORD AND TENANT. 2.

STATUTES—*continued.*

—— 56 & 57 Vict. c. 61 - - - - 323
See PUBLIC AUTHORITIES PROTECTION.

—— —— c. 71 (Sale of Goods), s. 18 - 250
See SHIP AND SHIPPING.

—— 59 & 60 Vict. c. 25 (Friendly Societies Act, 1896), s. 25 - - - - - 213
See FRIENDLY SOCIETY.

—— —— c. 26, s. 7 - - - - - 213
See FRIENDLY SOCIETY.

—— 3 Edw. 7, c. 37, ss. 6, 18, 19 - - 248
See LANDLORD AND TENANT. 1.

—— 6 Edw. 7, c. 54, s. 1, sub-s. 2 - - 190
See TOWN TENANTS ACT, 1906.

—— 7 Edw. 7, c. 53, s. 19—Appeal from requirement of local authority to repair street [171
See PUBLIC HEALTH ACTS.

—— 8 Edw. 7, c. 67, ss. 103, 131 - - 35
See CRIMINAL LAW. 2.

—— 4 & 5 Geo. 5, c. 58 (Criminal Justice Administration Act, 1914) - - - 79
See JUSTICES — JURISDICTION (PETTY SESSIONS).

—— 5 & 6 Geo. 5, c. 89 (Finance) - - 66
See REVENUE—EXCESS PROFITS.

—— —— s. 22 - - - - - - 60
See REVENUE—INCOME TAX.

—— —— c. 97 - - - - - - 244
See WAR—EMERGENCY LEGISLATION. 3.

—— —— (War restrictions) - - - 332
See WAR — INCREASE OF RENT AND MORTGAGE, INTEREST.

—— 7 & 8 Geo. 5, c. 46 - - - 52
See CORN PRODUCTION ACT, 1917.

—— 8 Geo. 5, c. 64 - - - - - 419
See PARLIAMENT—FRANCHISE.

SUBDIVISION of judicial tenancy under verbal agreement to sell portion - - 339
See LANDLORD AND TENANT. 1.

SURETIES OF THE PEACE and for good behaviour—Right to call witnesses 79
See JUSTICES' JURISDICTION (PETTY SESSIONS).

TOWN TENANTS ACT, 1906 (6 *Edw.* 7, *c.* 54)—**Compensation for improvements**—*Basis of assessment—Enjoyment by tenant of improvements—Discretionary power to reduce compensation—Building lease—Covenant to expend sum on*

TOWN TENANTS ACT—*continued.*
buildings—Expenditure of greater sum—"Rent"—sect. 1, *sub-s.* 2.] In 1835 lands were granted by a lease for lives containing a covenant by the lessee to expend £200 in building a house. This lease became vested in *M.*, who, in 1878, granted a sub-lease of the premises to *P.*, and in 1899 assigned his reversion to *P.* and the applicant; *P.* subsequently died, when the lease became vested in the applicant solely. The lease terminated by the dropping of the last life in 1915. *P.* in 1878 and 1879 had erected buildings on the lands, of which the value at the termination of the lease in 1915 was £1800. The resulting addition to the letting value of the holding from 1878 until 1915 was £60 per year. The capital value of that addition was in 1915 £1200. On a claim by the tenant for compensation for improvements under the Town Tenants (Ireland) Act, 1906, *Held*, by the King's Bench Division, 1, that for the purposes of that Act, the lease was a building lease only as to the amount which the tenant covenanted to expend on building; 2, that the enjoyment by the tenant of the advantage of the improvements had not necessarily extinguished her right to compensation for them; 3, that the rent which the Court may take into consideration under sect. 1, sub-s. 2, is the rent payable by the tenant for the holding; 4, compensation for improvements is limited to increased letting value, the result of such improvements. *Held*, by the Court of Appeal (affirming the decision of the King's Bench Division), 1, that the enjoyment by the tenant of the advantage of the improvements during the period 1878 to 1915 had not necessarily extinguished her right to compensation, and 2, that the initial figure, being the amount to be allowed for the additional letting value resulting solely from the tenant's improvements, not exceeding the capitalized value thereof as a maximum, was the sum from which any sum representing a reduction of the tenant's claim in respect of the time during which she had enjoyed the advantage of the improvements should have been deducted, and not the sum representing the value of the improvements at the date of the determination of the lease. *Peart* v. *Barrett and others*

[K. B. D.; App. 190, 465

TRINITY COLLEGE, DUBLIN—Buildings of a public nature - - - 493
See Rates—Exemption.

VOLUNTARY ASSIGNMENT - - 71
See Deed.

1. WAR—EMERGENCY LEGISLATION—Food Control—Bread—*Defence of the Realm Regulation*, 2 *F.—Flour and Bread (Prices) Order*, 1917 (5 *b*)—*Maximum price of bread—Reasonable additional charge for making delivery—Delivery—Bread sold from a travelling van.*] Under the Flour and Bread Prices Order, 1917, 5 (*b*), an additional charge for delivery may be made in the case of bread sold (not in pursuance of any previous contract) from a van that comes at the express or implied request of a customer residing in the country at a distance from the bakery and other bakers' shops. *Wallace* v. *Burrows*, [1918] 2 I. R. 127, considered and distinguished. *Spicer* v. *Murnane* - - - - K. B. D. 57

2. WAR—EMERGENCY LEGISLATION—Increase of Rent and Mortgage Interest—"Enforcing security"—*War Restrictions Act*, 1915 (5 & 6 Geo. 5, c. 97)—*Mortgagee's action of ejectment—Letting by mortgagor void against mortgagee—"Deriving title under mortgagor."*] *A*, the owner of a leasehold house, assigned it by way of mortgage: the interest of the mortgagee become vested in the plaintiff. *A* subsequently assigned his interest in the premises to *B*, who made a letting to *C*, which was void against the mortgagee. The plaintiff brought an action of ejectment on the title against *A*, *B*, and *C*. *Held*, 1. That in bringing the action the plaintiff had taken a step for enforcing his security within the meaning of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), sect. 1, sub-s. 4. 2. That *C* was a person deriving title under the mortgagor within the meaning of sect. 2, sub-s. 1 (*d*), of that Act. *Martin* v. *Watson and Egan* K. B. D. 332

3. WAR—EMERGENCY LEGISLATION—Increase of Rent and Mortgage Interest—*War Restrictions Act*, 1915 (5 & 6 *Geo.* 5, c. 97)—*Notice of intention to increase rent—Effect—"Rates chargeable on the occupier"—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *sect.* 181.] The landlord of premises to which the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, applied, served notice of intention to increase the rent in respect of the increase in the amount of rates thereon paid by him. The rates in question were (*a*) poor rate, and (*b*) certain rates levied under local Acts which incorporated the Towns Improvement Clauses Act, 1847. The tenant refused to pay the increased rent. *Held*, 1. That the rent was increased by service of the notice without any agreement by the tenant to pay the increased rent. 2. That the landlord was entitled to increase the rent in respect of the increase in the amount of poor rate, but not in respect of the increase in the amount of the rates levied under the local Acts. *Cork Improved Dwellings Co.* v. *Barry* - - K. B. D. 244

WILL — RESIDUARY BEQUEST—"Personal effects"—*Words—Gift of "my walking-stick" to B, followed by a gift of "all my personal effects" to C.*] A testator left his interest in landed property to A, his walking-stick to B, and all his personal effects to C. *Held*, that the last gift captured the residue of testator's personal estate. *In the Goods of Wolfe.* K. B. D. (PROB.) 491

WILL — REVOCATION — Dependent relative revocation—*Printed form containing revocation clause executed by testator—Blanks subsequently filled in—Small estate—Practice—Question decided on motion.*] M. I. signed a printed form of will containing blanks, the printed matter including a revocation clause, and his signature was duly witnessed by two witnesses. All the blanks in the form were filled in by M. I. subsequently to execution. On motion on notice by the person named as executor to have the revocative part alone admitted to probate, the Court found the following facts:—1, That the attempted revocation was merely the first act towards accomplishing testator's design to make a new will; 2, that it was dependent or conditional on a new will being made; 3, that no will was made; and *held*, that the doctrine of dependent relative revocation applied, and that probate should be refused without requiring the alleged will to be propounded. *In the Goods of Irvine* - K. B. D. (PROB.) 485

WILL—WORDS—"Belonging to" - 115
See MALICIOUS INJURY. 2.

WILL—*continued.*

—— "Building lease" - - - 190
See TOWN TENANTS ACT.

—— "Deriving title under mortgagor" - 332
See WAR — INCREASE OF RENT AND MORTGAGE INTEREST.

—— "Enforcing security" - - 332
See WAR—INCREASE OF RENT AND MORTGAGE INTEREST.

—— "Immediate use or enjoyment" - 28
See POOR RATE—OCCUPATION.

—— "In the possession or apparent possession of person making such bill of sale" 71
See DEED.

—— "Mariner or seaman being at sea" 404
See PROBATE—GRANT OF.

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LONDIN.
UNIV.